18270

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,
Plaintiffs,
vs.
R.J. REYNOLDS TOBACCO
COMPANY, et al.,
Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida
1:40 p.m.
December 21, 1998

TRIAL - VOLUME 166

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

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18271

APPEARANCES:
STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs
DECHERT PRICE & RHOADS
ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris
COLL DAVIDSON CARTER SMITH SALTER & BARKETT
NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris
ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris
CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds
JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds
KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson
CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group
SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard
DEBEVOISE & PLIMPTON

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ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

18272

(APPEARANCES - Continued)
GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute
KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

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18273

I N D E X

WITNESS PAGE
PAUL C. MELE, Ph.D.
Cross by Mr. Heim 18279
Redirect by Mr. Rosenblatt 18336

E X H I B I T S

PLAINTIFFS' EXHIBITS | OFFERED PAGE | ADMITTED PAGE | FOR ID PAGE
410 18275

E X H I B I T S

DEFENDANTS' EXHIBITS | OFFERED PAGE | ADMITTED PAGE | FOR ID PAGE
36684 18294

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18274

(Whereupon, the following proceedings were had:)

THE COURT: Okay. Ready?

MR. HEIM: Just a couple of things, Your Honor, before we start, one of which has no real relevance to Dr. Mele, and the other, we probably ought to ask him to step outside for a minute.

THE COURT: If you would, Doctor, just one second or a couple of seconds.

MR. HEIM: The first thing, Your Honor, as I mentioned to Mr. Rosenblatt, that I inadvertently -- I didn't recognize one of the documents that got used just ever so quickly this morning as a privilege document.

I had correspondence with Mr. Rosenblatt that we weren't going to use privileged documents, so I'm

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16 sure he didn't do it on purpose, and I didn't miss it
17 on purpose.
18 THE COURT: Which one was it?
19 MR. HEIM: It was 410. So I would just ask
20 that we put off admissibility as to that document until
21 we do the other privileged documents. It was 410. I
22 don't think it was actually offered into evidence yet,
23 but I may have said at some point along the line I
24 didn't have an objection to it.
25 THE COURT: Yes, you did.

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18275
1 MR. HEIM: But I didn't have it in front of
2 me was my problem. And it is on our privilege log, and
3 we have a privilege objection to it.
4 I don't think there's a problem on the
5 plaintiffs' side with just holding that one off.
6 MR. ROSENBLATT: No, there isn't.
7 THE COURT: Okay.
8 Miss Clerk?
9 THE CLERK: Yes, sir.
10 THE COURT: 410 has been admitted, but leave
11 it over for I.D.
12 THE CLERK: It will be for I.D.
13 THE COURT: For I.D.
14 (Plaintiffs' Exhibit 410 was marked for
15 identification.)
16 MR. HEIM: Then, Your Honor, the other
17 subject is, over the lunch hour, I went back to the --
18 I went back to the transcript from last Tuesday to try
19 to figure out what had been said and what hadn't been
20 said on the subject of the Shook Hardy lawyers and
21 legal liability, because -- and what I found was that
22 there had actually been a fair amount of testimony
23 about this, both to the jury and on voir dire. I
24 didn't remember that there was so much discussion about
25 it in the testimony on Tuesday.

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18276
1 But there was testimony -- there was one line
2 of testimony where Dr. Mele said that -- that legal
3 considerations were the reason that the lab was being
4 closed, and that was followed immediately after by

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a
line of questions about the Shook Hardy lawyers' presence. And it was at that point that we went into voir dire about the Shook Hardy lawyers.
THE COURT: Do you have the reference there?
MR. HEIM: Yes, sir. Pages 17754 and Pages 17755.
THE COURT: What is the text of that so I can see it? Just read it into the record.
MR. HEIM: Sure. On 17754, the question is:
Okay. When Charles answered your question and told you that the laboratory was being closed, that this was a business decision, did you understand what he meant?
The witness said: No. Well, I got no further explanation, although it had been clear in discussions with Jim Charles directly and Dr. Osdene and Dr. DeNoble for several months before that, that there was great concern that the work we were doing was causing -- then I said objection, and then he answered -- a legal liability.
And then Your Honor said: Just leave it at that.

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And then the next question was: Now, you referred to this six or nine-month period before April of '84 when you got some indication the lab might be closed. In terms of specific events or anyone coming to the lab during that time frame, the next -- the six or nine months before, what happened?
And the answer was: We had several visitors. In and around '83, we had a series of outside attorneys come from the firm of Shook, Hardy and Bacon in Kansas City. We were told that those are attorneys.
Then there's an objection.
Then we go into a sidebar, and then we go into a voir dire examination on the whole Shook Hardy.
THE COURT: That's where the Cipollone issue

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came up.
MR. HEIM: Yes. Yes, Your Honor.
So my position is, based on those two questions being asked back to back, I need to be able to at least ask this witness whether or not they weren't there for the defense of lawsuits in terms of looking at documents, without mentioning Cipollone or any particular --
THE COURT: How would he know?
MR. HEIM: Pardon?
THE COURT: How would he know?

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MR. HEIM: Well, he says on voir dire that he -- that there was --
THE COURT: They were there because of the pending litigation?
MR. HEIM: Right.
THE COURT: Specifically the Cipollone case.
MR. HEIM: Well, he doesn't say -- in the first voir dire answer, he doesn't say Cipollone. He just says: To defend litigation.
And what I'm saying is, I need to be able to ask him, because if I don't, the jury will be left with an impression that they were there to close it down when --
THE COURT: Yes. That's why I --
MR. HEIM: -- that's not the case.
THE COURT: -- I asked you, do you really want the objection sustained.
MR. HEIM: No, I don't. I didn't remember what the examination had been last week, and that's why I went back to look at it.
THE COURT: I said it four times. You really want that? You said, yeah. I said okay.
MR. HEIM: If I did, I misspoke.
Whether it's cumulative or not, I think I should be entitled to ask him those questions.

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THE COURT: He already said they were there for pending litigation of some sort.

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MR. HEIM: Right. Without asking him any question about the pending litigation --
THE COURT: Right.
MR. HEIM: -- I'm just going to ask him one or two questions.
THE COURT: You can ask him, you know, why they were there, in the sense of whether they were there to gather documents or whatever. He may or may not know.
MR. HEIM: Right.
THE COURT: Okay. As long as it's already done and in the record. Okay.
Let's bring them out.
THE BAILIFF: Bringing in the jury.
(The jury entered the courtroom.)
THE COURT: Okay. Do we need the witness?
(The witness entered the courtroom.)
THE COURT: All right. I believe we were going to start with cross examination.
MR. HEIM: Yes, sir.

CROSS-EXAMINATION

BY MR. HEIM:

Q. Good afternoon, Dr. Mele.

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Doctor, my name is Bob Heim. I represent Philip Morris, and I'm going to try to bring us back a little bit to some of your testimony, I think it was last Tuesday, and I'm going to be asking you questions principally about what you did while you were at Philip Morris and the results of your research while you were there. Okay?

A. Okay.

Q. Now, you worked in the -- I think we all remember, you worked in the behavioral pharmacology laboratory at the R&D center in Richmond; right?

A. Correct.

Q. And R&D is research and development center?

A. Correct.

Q. Okay. And as I recall what you said, you worked for -- with and for Dr. DeNoble, who was your project leader?

A. That's correct. Right.

Q. Okay. And he, Dr. DeNoble, reported to

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Dr. Charles?
A. Uh-huh.
Q. And Dr. Charles reported on up to Dr. Osdene; is that right?
A. Correct.
Q. Okay. And then, I guess, Dr. Osdene reported

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to Dr. Hausermann?
A. Right. The vice president.
Q. Right. So there were a whole bunch of different levels at the R&D center, and that essentially was the reporting structure up the line?
A. Presumably, right.
Q. Okay. As far as you knew?
A. Yes.
Q. All right. And the research and development department in Richmond is one of a number of departments in the whole company; right?
A. That is correct.
Q. Okay. Now, your degree was in experimental psychology, and your specialty was in behavioral pharmacology?
A. Correct.
Q. And your job working with Dr. DeNoble was to look at the effects of certain drugs and compounds in rats and the brains of rats?
A. Correct.
Q. Okay. And those rat -- those studies with rats, the centerpiece of those studies with rats were what you've described as the self-administration studies; were they not?
A. They were, yes. A majority of our time was

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spent on those.
Q. Okay.
A. Or much of our time.
Q. And the basic idea was to understand how nicotine or other -- some other compounds, acetaldehyde, for example, how it affected the brains and the behavior of rats?
A. Correct. Nicotine and acetaldehyde and some of the other drugs we looked at.
Q. And some others, right.
And you would do these studies and do the

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12 research, like scientist -- like a good scientist
13 would, and you would report the results, and the
14 results would get reported up the chain somewhere;
15 right?
16 A. Correct.
17 Q. Okay. Now, I want to start, and what I'll
18 try to do, Doctor, is -- so that we're talking about
19 the same thing, if I'm shifting to a different subject,
20 I'll let you know.
21 A. Okay.
22 Q. So you can kind of readjust as we do this.
23 But I want to start with nicotine and
24 self-administration of nicotine. And am I correct that
25 determining whether or not nicotine was addictive was

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1 not the purpose of the behavioral pharmacology lab?
2 That is correct. Nobody -- our goal was not
3 to prove or disprove addiction. Our goal was to find
4 compounds that would substitute for nicotine, because
5 the question of addiction or dependence was never in
6 doubt --
7 Q. Okay. And --
8 A. -- to my understanding.
9 Q. So your job -- you weren't looking at whether
10 nicotine was addictive in connection with the analog
11 program. You were looking at issues with regard to,
12 for example, whether it would meet the goals -- the two
13 goals that you testified before of the analog program;
14 maintaining the physiological effect and reducing any
15 cardiovascular concerns; right?
16 A. Those were the primary goals. Though, to
17 fully characterize an analog, which was part of our
18 job, we were trying to fully characterize the effects
19 of nicotine. There were studies we ran other than the
20 self-administration to get a broad view of what any
21 single particular drug would look like.
22 Q. Right. I'm already violating my own rule,

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23 because I already jumped to analog. I didn't mean to
24 do that yet.
25 I wanted to just stay on the subject of

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18284
1 nicotine and what you were really looking at and what
2 you found and what you didn't find, okay, with regard
3 to nicotine.
4 Now, one of the important things you were
5 looking at was to see whether nicotine was a positive
6 reinforcer; correct?
7 A. That is correct.
8 Q. Okay. And the way you did that would be to
9 look to see whether rats would self-administer the
10 nicotine, whether they would work to get the nicotine;
11 correct?
12 A. That is correct.
13 Q. Now, there had been some studies done before
14 yours by researchers outside the tobacco companies on
15 self-administration of nicotine by rats, or in rats,
16 but I think you said that they weren't as complete or
17 as thorough as yours; would that be a fair
18 characterization?
19 A. That is correct. There were certain
20 characteristics of those studies and certain controls
21 that we felt needed to be done to unequivocally show in
22 rats.
23 Q. Okay. Those studies did conclude that there
24 was positive reinforcement; didn't they?
25 A. I'd have to see those papers. They might

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18285
1 have.
2 Q. Okay. Do you remember some work that was
3 done by some Australian scientists?
4 A. Yes.
5 Q. Okay. And those scientists had concluded
6 that nicotine was a positive reinforcer in rats?
7 A. Right. That's correct.
8 Q. Okay. Now, was one of the -- was one of your
9 concerns about those other studies, even though

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they
10 showed that nicotine was a positive reinforcer,
that
11 they -- that they didn't deal with food
administration
12 in the way that you dealt with it?
13 A. In order for those studies to get their
rats
14 to self-administer nicotine, they had to
concurrently
15 provide food reinforcement to the animals over --
when
16 the animal was working, he was really working for
two
17 things. And the only way you can tell what he's
18 actually working for is to pull one or the other
out.
19 And when the food was eliminated, the rats stopped
20 working for the nicotine.
21 So they may have concluded nicotine was
a
22 positive reinforcer in those studies. That would
have
23 met the usual criteria of the community.
24 Q. Now, were you aware of any studies by
outside
25 researchers, such as the Australian researchers,
before

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1 yours, that rats will self-administer nicotine,
even
2 without a food administration schedule?
3 A. There were attempts to show that. One
study
4 by a researcher, I believe his name was Hanson,
had
5 some self-administration of nicotine, but it
didn't
6 seem to -- the self-administration didn't vary
when he
7 substituted saline for nicotine, which is another
very
8 critical point. A rat is going to press a lever
at
9 some low level for both a drug and a vehicle.
That
10 certainly doesn't confirm that he's responding to
the
11 drug.
12 Q. Were you aware of any other studies that
13 showed, again by people who are looking at this
subject
14 outside the tobacco companies, and I mean before
you
15 did your work, that showed that nicotine was a
positive
16 reinforcer even without regard to food
administration?
17 A. There were -- there were other studies.
18 Again, none of those studies, in our view,

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19 unequivocally showed it was a positive reinforcer
20 because they didn't run through the number of
adequate
21 and necessary control procedures to demonstrate
you
22 could manipulate nicotine self-administration in
the
23 rat. You could increase it or decrease it by your
24 experimental control.
25 Q. Okay. So what you're saying is that,
while

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18287
1 there were outside researchers who were looking at
this
2 issue of nicotine being self-administered by rats,
and
3 concluding that they -- that nicotine was a
positive
4 reinforcer, the studies weren't done sufficiently
5 carefully or didn't have sufficient controls, or
at
6 least -- they weren't as good as yours in that
regard?
7 A. I can't even say they concluded. I'd
have to
8 see those. And in cases where you can't show that
type
9 of manipulation and demonstration, the
conservative
10 reasonable response would be, we're not
manipulating
11 this treatment as we should and further studies
are
12 warranted, there's clearly not a good
understanding
13 that there are variables that control nicotine
14 self-administration in a rat. Up until that
point,
15 there was not a good understanding in the
literature.
16 Q. Okay. Now, the fact this drug or a
compound
17 is a positive reinforcer doesn't necessarily mean
it's
18 addictive; does it?
19 A. No, it does not. I don't know if you
can
20 ever demonstrate addiction in a rat. A rat is a
rat.
21 Addiction is a particularly human quality.
22 But if a rat will self-administer a
drug, a
23 human will self-administer a drug. There's no
drug
24 that I am aware of that a rat self-administers and
25 humans don't.

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18288

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Once you have self-administration, especially if it's a nonmedical use for the drug, by definition, that's drug abuse. And then, as the frequency and compulsiveness of that use expands, you get into drug dependence and addiction in people.

Q. Right.

A. But it's certainly a prediction that the compound is likely to be abused.

Q. All right. So what you've said is that, when you work with rats, rats -- you can look to see whether, when you take a drug like nicotine, okay, you can look to see whether or not, through scientific experiments, it has certain characteristics. And if one defines a term like addiction, in terms of those characteristics, then you can -- you can draw at least a conclusion about it.

You can say, well -- let me start over. That's a bad question already.

What I'm getting at is, rats aren't people; we all know that; right? But if you say positive reinforcement is a feature, a characteristic of addiction, if you set that in humans, then you can see whether positive reinforcement takes place in rats, and then you can say that's predictive of humans; right?

A. Correct.

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Q. And you can do that with other things, as well. For example, if you set up as your hypothesis that physical dependence is a criteria for addiction, then you can look to see whether there is physiological dependence for nicotine in rats, and there either is or there isn't; right?

A. When you say there is or there isn't, with adequate testing and evaluation, yes.

Q. Okay.

A. I mean, at some point, you would, with enough studies and enough manipulations, you would reach a conclusion one way or the other.

Q. You would conclude that there either is physical dependence or there's not in rats; right?

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A. Correct.
Q. Okay.
A. You would do that.
Q. You concluded in your research that nicotine was a relatively weak positive reinforcer; correct?
A. That statement was made very early on in an attempt -- yes, we did make that statement, very early on, in an attempt to qualify our results.
Again, this was the first -- early on at Philip Morris, when I was there, this was the first real demonstration of nicotine as a positive reinforcer

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18290

with rats. We weren't sure what to expect.
The self-administration we got out of the rats was very reliable, but the numbers were somewhat low, at least comparing to other studies published in the literature.
What we really needed to do -- so in one sense we were being conservative because it was the very first study. And with any study you want to see replication and expansion.
Q. Doctor, were you comparing --
A. And --
Q. I'm sorry.
A. I just wanted to say --
Q. Finish your answer.
A. -- what we really needed to do for that qualifier is to compare nicotine directly to other drugs of abuse, which we were not allowed to do.
So, without any direct comparison, it's hard to say whether it's weaker or stronger. You could make the same claim for heroin being weaker than cocaine, for example, comparing a cross-study.
Q. Well, didn't you in your studies actually make a comparison between the reinforcing effect of nicotine and the reinforcing effect of four classes of abused substances?

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18291

A. Not in our actual experiments, no. We were

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never able to bring in controlled substances commonly known as drugs of abuse into the lab.

Q. Well, do you recall whether or not you contrasted and compared, for example, the reinforcing effect of nicotine, which, as you've said, you described in your early-on work as being weak, with the reinforcing effect of things like opiates, amphetamines, barbiturates and alcohol?

A. Yes. Again, those were discussed comparing our results and published studies in the literature.

Again, to really make an adequate comparison to control for all of the variables that come into play when you compare studies from different laboratories, you really need to do a direct comparison in your laboratory, preferably in the same rats, to get a real understanding of that.

And without that type of additional data, the conclusion that it was weak was very conservative and probably was very unwarranted in one sense.

Q. Well, did you conclude, based on the work you did with your rats and the reinforcing effect of nicotine there, the positive reinforcing effect of nicotine in the literature, and such things as alcohol, barbiturates, amphetamines and opiates, which would

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include morphine and heroin --

A. Opiates, yes.

Q. -- that nicotine, compared to what the literature was saying about these other things, was a weak reinforcer, that these other things were strong -- much stronger reinforcing than nicotine?

A. Well, again, our procedure is -- we're not exactly the same as those used in the literature. We did make that conclusion very early on. And, in fact, while we were collecting some of that data, there was a study that came out in monkeys that directly compared nicotine and cocaine self-administration, which was one of the few studies that directly compared those

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two
14 drugs.
15 And, indeed, they found that in many
16 instances, nicotine and cocaine were similarly
17 reinforcing. So that's the kind of study that
needs to
18 be done. That's the kind of study we were not
allowed
19 to do. And without that data, even though we made
that
20 statement, it's got to be qualified because we
didn't
21 have as much data as we needed to make a very
firm,
22 very committed statement.
23 Q. Doctor, what I'm going to do is, just to
see
24 if I can refresh your recollection on some of
this, I'm
25 going to -- assuming I can find it here in a
minute --

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18293
1 I'm going to give you a copy of a draft report of
your
2 research for 1984 and ask you some questions
about.
3 First of all, whether you remember it or not.
4 So, let me see if I can find it. It is
5 marked as a plaintiffs' exhibit, Judge. It's
6 Plaintiffs' Exhibit 5458. But we'll have to give
it a
7 defense number.
8 THE COURT: 5458?
9 MR. HEIM: Yes. It is marked as
Defendants'
10 Exhibit 5458. But for identification purposes,
I'll
11 refer to it as -- oh, it's premarked.
12 Thanks, Chris.
13 It's premarked as Defendants' Exhibit
36684.
14 And if I may --
15 THE COURT: Let me see it.
16 MR. HEIM: I have one for you.
17 THE COURT: I just want to see this for
the
18 numbers.
19 Okay. I don't see it on my list here.
It
20 hasn't been marked for identification or as an
exhibit
21 yet.
22 MR. HEIM: It is on the -- it is on the
23 plaintiffs' exhibit list as 5458.
24 THE COURT: I don't see that
designation.
25 MR. HEIM: Let me see if I can find it.

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18294

THE COURT: I have 5448. Maybe that's the one you're talking about.

Do you have it?

MR. HEIM: I think the different -- I think what we're saying, Judge, is that it was on their list of exhibits. I don't think it's one that they offered this morning.

THE COURT: It hasn't surfaced yet.

MR. HEIM: Right. It hasn't surfaced.

THE COURT: Let's mark it, then, if that's the number, 5458, let's mark it for identification for that purpose.

MR. HEIM: Okay.

THE COURT: As a defense, 5458?

MR. HEIM: It would be defense.

THE COURT: Defense 366 --

MR. HEIM: 84.

THE COURT: -- 84.

MR. HEIM: Right.

THE COURT: That's what we'll do.

(Defendants' Exhibit 36684 was marked for identification.)

THE COURT: This is Defense I.D. 36684.

MR. HEIM: Okay. Now, I need to give Dr. Mele one.

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18295

(Document handed to witness.)

BY MR. HEIM:

Q. Doctor, can you just take a quick look at this document and tell me if you recognize it?

A. It looks like a draft of an annual report.

Q. And is this -- as you look at it, it begins at the top: We've continued to use the self-administration technique.

A. Correct.

Q. Does this look like a draft of the annual report for the behavioral pharmacology lab?

A. Sure.

Q. Okay.

A. Yes.

Q. And as you look at some of the data in there, for example, Page 6, it's far too complicated for me to try to ask you questions about it, but does that look like to you -- does that look like the kind of the studies that you would do?

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A. This looks like one of our annual reports,
yes.
Q. Okay. Now, in here, you make reference -- if
you look at the very first page, right under experiment
one where you say: The weak reinforcing effect of
nicotine is notably different from the four classes of

abused substances.
A. Uh-huh.
Q. Do you see that?
A. Yes. Right here.
Q. And then it says: However, the lack of a
physiological dependence following chronic access sets
nicotine apart from only three classes.
Now, actually, what you were talking about
there is that amphetamines and cocaine are the one
class that doesn't create -- that is a powerful
reinforcer as opposed to the others; right?
A. Would you repeat that, please?
Q. Sure. What I'm saying is, just so we're
seeing what you said in your annual report, your draft
annual report here, is you're basically saying that
three of the four of those classes that we talked about
of abused substances are more powerful, positive
reinforcers than nicotine?
A. Correct.
Q. Okay. And the one -- the one that is
different is amphetamines and cocaine?
A. I don't -- I'm not -- I'm sorry. I'm not
following that.
Q. Okay. If you just read the first paragraph
there -- let me see if I can straighten it out this

way. Why don't I give you a minute to read that first
paragraph, and then you can probably help us all with
this.
The subject matter is physiological
dependence and reinforcement.
A. Okay.
Q. Okay. So, you had established, through your
preliminary research, that nicotine did not create

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a
physical dependence; correct?
A. Correct.
Q. And I think in this report, you were saying that, except for amphetamines and cocaine, the other three categories, alcohol, heroin, morphine, do create a physical dependence; right?
A. Yes. Alcohol or barbiturates and opiates are well-known in their strong physical dependence-producing properties.
Q. You were distinguishing -- on the one hand you were saying nicotine doesn't create a physical dependence. Alcohol does, barbiturates do, heroin does. But cocaine is more like nicotine in that regard, it does not?
A. Amphetamines and cocaines and those classes of drugs certainly are different, yes. In the one study we conducted with nicotine, the initial study, we

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were unable to demonstrate a physical dependence.
Q. Okay. So, then, as I understood your report when I read it, you then went on to see whether cocaine and amphetamines were different from nicotine in some other way. That is, you did some actual research studies to see whether cocaine -- self-administration of cocaine or amphetamines had been found to disrupt ongoing behavior that were maintained by other reinforcers; isn't that what you were saying at the bottom of that page?
A. I'll have to take a few minutes to read this.
Q. Sure. Take a minute and look at it.
You can see where it says the purpose of the present experiment.
A. Yes. Right. Okay. Yes. I see where you are.
Q. Okay. And your conclusion was that nicotine does not interfere with self-administration of another reinforcer like food, but cocaine does; right?
A. Depending upon your dose and your conditions of delivery, yes, and that sort of thing, yes. I mean --
Q. Okay.

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A. In this one -- again, in this one first study, it looks like we were unable to demonstrate

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18299

that.
Q. Okay. And to the extent that -- to the extent that physical dependence, physiological dependence is viewed by the scientific community as a criteria for addiction, your research was actually helpful to the company; was it not?
A. Well, actually, physiological dependence at that time was not viewed as a criterion for addiction. It was a possible criteria for some, but that -- although that was an older view by the early '80s, most of the textbooks that were out did not insist on having physiological dependence as a criterion for addiction. It could be there, but it wasn't essential.
Q. My question, Doctor, was that --
A. But the answer is, I guess, no.
Q. My question -- let me go back to the question.
My question was, to the extent -- to the extent that there were views that physiological dependence was required in order for a substance to be addictive, there had to be a physical dependence on the subject. To that extent, to accept that, your research would have been helpful to Philip Morris; correct?
A. If one accepts that view, right.
Q. It would have been helpful?

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18300

A. Presumably.
Q. All right. And, again, to the extent that your research showed that cocaine -- self-administration of cocaine will interfere with the administration of other reinforcers, like food, and nicotine does not, nicotine does not disrupt ongoing behavior, that would be helpful to the company as well in distinguishing nicotine from cocaine; right?
A. Well, one -- let's make it clear. We never did look at cocaine. Okay. We never looked at cocaine directly.
And it's important to make a distinction between studies that show something definitively

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and
studies that fail to show something. When you do
scientific studies and you fail to get a result,
the
question is always there, what else do we need to
do to
demonstrate the phenomena we're looking at?
And in our case, we had a series of
studies,
such as the failure to disrupt the ongoing
behavior and
the failure to demonstrate a physiological
dependence,
but we had very few opportunities to pursue those
lines
of research to see what else we could generate in
further studies.
Q. Doctor, would you -- the pages aren't
numbered, but if you'll turn to table one, which
is

actually your fifth page in --
A. Okay.
Q. -- the last two sentences reads as
follows:
The major finding is that self-administration of
nicotine does not interfere with self-
administration of
another reinforcer, food, in parenthesis. This is
in
direct contrast to data obtained with morphine,
ethanol, phencyclidine, amphetamine or
pentobarbital.
This would suggest that nicotine can be
differentiated
for classically abused drugs, using several
behavioral
tests.
Now, after you concluded that in this
report,
did you make any qualifications that you can find
about
needing further research or that this --
A. Well --
Q. Did you qualify that in any way the way
you
just did here today?
A. No. There was certainly no question
that we
would never be allowed to have drugs like cocaine
or
amphetamine in the laboratory. When we actually
requested to bring amphetamine in, that was
declined
outright by Jim Charles. They did not want any
type of
scheduled controlled substances in there that
would
relate us in any way to drugs.
And so we were unable to do those

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studies.

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18302

And we were unable to follow up on these studies.
Q. And do you in any way -- well, never mind.
Skip it.
Doctor --
A. I think it was common scientific understanding: You do a study. This is what we did.
This is what we found.
There are many more studies to do. We didn't routinely list every study we wanted to do in these types of reports. We were trying to keep those as short and concise as possible.
Q. But you wouldn't -- excuse me. I'm sorry. I didn't mean to interrupt you.
Doctor, you didn't write anything in this report that you didn't think was correct; did you?
A. No. No. I think at this time, after this first study, that was a conclusion comparing a cross-study in the literature. And we clearly did not find the disruptions that the other studies had been -- had reported.
So, at this point there was a distinction between nicotine and these other -- other studies that had already been published.
Q. You mentioned --
A. I might add, though, that each of these

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18303

classes of drugs that are mentioned here also can be distinguished amongst each other in various ways, so this happened to be one grouping. You could scramble this grouping if you were looking at other factors or other variables, to try and distinguish, again, one class of abused compound from another.
Q. And this was the grouping that you selected for purposes of this report?
A. Correct. Well, yes.
Q. All right. Now, when you took rats off nicotine in your studies of self-administration of nicotine, when you took the rats off the nicotine,

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they
did not experience or you did not observe physical withdrawal symptoms in the rats; did you?
A. That is correct.
Q. It's correct that you did not observe withdrawal symptoms?
A. We did not in our studies, although within five to eight years, there were a number of reports in the literature using more sensitive techniques, apparently, than we did, and they were able to demonstrate, in three or four different laboratories, physiological withdrawal in rats following chronic nicotine administration.
Q. But as far as what you were saying to your

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superiors and what you were saying in your reports to Philip Morris, you didn't find any?
A. We could not find any. We could not demonstrate it.
Q. All right. Now, you believe that rat models can be predictive of human behavior; don't you?
A. I think that's a fair statement.
Q. And while it can be difficult to make a direct comparison, you know how reinforcing something is in a human when it's reinforcing a rat, it's a value; correct?
A. I'm not sure what you mean by value.
Q. Well, it's predictive in the way that you suggested --
A. Well, if a rat will self-administer it --
Q. Right.
A. -- a human will self-administer it.
Q. Right. What I'm saying is you would agree that you can't, for example, establish the degree of self-administration, the quality of self-administration in a human based on a rat, but you can observe that if a rat will self-administer, a human will self-administer?
A. Well, certainly not on the basis of one rat study. You might want a series of rat studies that

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look at a number of factors and variables.

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You want to manipulate dose and access. You want to look at self-administration in other species. But any time you're investigating a new drug in animals, the chain is that you look at a series of animal species, what you get in animals, and establishing models is predictive of what you find in humans.

Q. So if a witness were to have come here and testified to this jury that rat work -- rat studies were not very valid for humans, for determining the effect in humans, that's something you'd strongly disagree with; correct?

A. In general -- I mean, you're saying that animal studies don't predict what you find in humans. Yes.

Q. I mean specifically rat studies. If a witness were to have come here and said to the jury, well, rat studies aren't very valid in terms of trying to figure out what will happen with a human, you'd disagree with that?

A. Well, I think rat studies are valid under the appropriate conditions in the right context.

Q. Now, I want to ask you a question or two about the conversation that you said you had with

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Mr. Remmington, okay, on the subject of whether -- whether nicotine is addictive.

Remmington was not a research and development person; right?

A. At the time I had interactions with him, he was at the operations center, which was one of the three main facilities down there. But he was not at the R&D center at that time.

Q. All right. And to your knowledge, had he ever been at the R&D center?

A. I don't recall. These guys would float around in the company and get moved up and sideways, so he most likely held a lot of positions. But I'm not aware of him being at the R&D center when I was there.

Q. And did you ever see his name on any of the reports that were -- that you were -- that behavioral

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pharmacology laboratory was sending out?
A. On the distribution list?
Q. Right. On the distribution list.
A. I never put together the distribution list, so I -- I mean, I never would have seen that. My stuff went either to DeNoble or Charles directly. But he wasn't in the R&D center, so --
Q. Do you still have up there, Doctor, the reports that were shown to you this morning?

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A. I do not.
Q. Well, let me just -- let me just show you the one in my hand while I take a second.
This is 5087, which was the behavioral pharmacology report.
A. Excuse me. Just in answer to your last question, again, most of the time I was there, the restriction was very, very narrow for our annual reports, so somebody like Remmington would be unlikely to see it until possibly later on.
Q. And actually, you have no idea whether he ever got to see any of these reports; right?
A. I do not know.
Q. All right. And the one I was going to hand you which was marked this morning as Plaintiffs' Exhibit 5087, if you would take a look at that, I see -- I just counted quickly about 24 people whose names are on that report. And you don't find Dr. Remmington there anywhere; do you? Or Mr. Remmington. I don't know what he was.
A. No. His name is not on this list. That is correct.
Q. Dr. Mele, is he a Mr. Remmington or a Dr. Remmington; do you know?
I'll take that.

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A. I'm not aware of him having a higher degree.
Q. Okay. So, as far as you know, Mr. Remmington who made this remark that you've quoted this morning, he didn't have access to information that your laboratory was producing on whether nicotine created a physiological dependence, or he didn't have access, for example, to your draft report there; correct?

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A. I can't answer that.
Q. All right. And you don't know, for example, whether back in 1984, 1983, Mr. Remmington had access to the views of someone like Dr. DeNoble on whether at that time Dr. DeNoble thought nicotine was addictive?
A. You're asking me did Remmington talk to DeNoble?
Q. Right.
A. I do not know if Remmington talked to DeNoble.
Q. And when you -- and when you --
A. If you're --
Q. When you were asked the question by Shep Pollack, who was then the president of the company, as to whether you thought nicotine was addictive, as I recall your testimony from Tuesday, you said that the laboratory wasn't set up to answer that question, and in order to answer that question, a fair amount of more

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work would have to be done?
A. The purpose of the laboratory, the stated goals were not to address addiction as confirming or denying.
The work we were doing certainly did address addiction, just because of the nature of the work and because of the analogs. But, as you pointed out, because we could not generate physiological dependence, we had some questions, we had some initial studies with our nicotine self-administration, we felt we needed to do additional studies to pursue that. But clearly this was the line of work to pursue if you wanted to get an answer to that question.
Q. All right. And when you gave them that answer, that you couldn't answer his question, that was -- that was an honest answer that you gave him, wasn't it, at the time?
A. Well, when the president of the company asks you a question like that out of the blue and it's using

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a word that one is then instructed not to use, it was an honest answer, and it was a rather intimidating question.

Q. Someone must have forgotten to instruct him not to use it.

A. That's probably true. He was the boss.

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18310

Q. But you wouldn't have given him a dishonest answer; right? Whether he's the president or not, you answered the question the way you thought the question ought to be answered?

A. Well, when he asked specifically, yes, whether those results showed -- proved it was addicting or not, again, addiction, I don't believe, is an animal quality, but we felt that's what our results had indicated.

Q. As I told you before, I was going to shift -- when I would shift, I would tell you.

Now I want to talk to you about analogs. Okay?

A. About?

Q. Analogs.

Now, as I recall, what you said on Tuesday, you were saying that these nicotine analogs, one of the ideas or part of the idea behind the development of a nicotine analog -- and an analog is a -- an analog is something you make in the laboratory, and it's a substitute for the natural compound; right?

Just so -- I wanted to make sure the jury -- kind of get us back to where we were last Tuesday.

A. Yes.

Q. So one of the reasons for looking at these

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18311

analogs was the company was kind of protecting itself against the possibility that nicotine would be banned. If nicotine were banned for use in cigarettes, they wanted to have something else that they could use.

A. Well, that was one of the possibilities. It wasn't -- I can't say I was ever -- I was never

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told
7 that was the driving force behind the analogs. It
was
8 one of the considerations that they might have to
deal
9 with.
10 They may want a compound that was,
again,
11 better in some ways and maintained the desired
12 qualities without losing those -- you know,
without
13 losing those qualities, so --
14 Q. Okay. And I remember you testifying --
and
15 you said that you heard that, that you heard that
that
16 was one of the possibilities, but --
17 A. That was discussed at the meetings.
18 Q. That was discussed. Okay.
19 And it was discussed that the company
wanted
20 to be prepared for that possibility; right?
21 A. I won't speak for the company, but for
the
22 scientific group, yes, in case that they needed to
put
23 in a substitute for nicotine, they would have one
on
24 the shelf ready to go.
25 Q. And I think that's an interesting
observation

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1 you just made, when you said you won't speak for
the
2 company. Your discussions, largely, except for
when
3 you had a visitor, which you said wasn't often,
but
4 your discussions largely were with the research
5 scientists at the R&D center; correct?
6 A. The research scientists at the R&D
center and
7 selected consultants, yes.
8 Q. Right. Like, Doctor -- well, we'll talk
9 about some of them. But that's right.
10 You weren't actively involved in talking
to
11 the management people in New York; for example?
12 A. We would have conversations with Fred
Newman
13 on our papers, the meanings of the papers, that
sort of
14 thing, explaining those to him. But in -- other
than
15 for one trip where DeNoble went up to New York to
do a
16 presentation at corporate headquarters on our
work,
17 most of our work was reported up through the
chain.

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Q. Okay. Up through the chain at the R&D center?
A. To New York. Jim Charles would often have, I was told by him, conversations with Fred Newman on the work.
Q. Well, what I meant, Doctor, you weren't involved in decisions about what products to use, how to commercialize products --

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A. Correct.
Q. -- those kinds of decisions. That was not anywhere near your field of -- your responsibility?
A. We weren't involved in product decisions.
Q. Okay.
A. In terms of marketing and that sort of thing or alter or manipulating a product.
Q. Okay.
A. A specific product.
Q. Or doing the engineering work to try to commercialize a product, you weren't involved with the production facility, the manufacturing process. That's something you weren't involved with; right?
A. Correct.
Q. Okay. Now, I think -- I made a note last week when you were testifying, that you said that what the company was trying to do with the analogs was two things; one was to have the same properties as nicotine in terms of the physiological effect that it has on a smoker's brain, you know, the same kind of effect that nicotine has, but to reduce or eliminate any cardiovascular effect, because you said that at that time, there was a concern about the cardiovascular effect of nicotine.
Now, do you know whether, after your time at

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the company, the scientific community expressed the view that nicotine is not a serious cardiovascular risk?
A. There are really two aspects of

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cardiovascular toxicity. That got factored out. It was realized later on that much of the stuff in non-nicotine, the stuff in tar, has certain effects, such as cholesterol effects, that would lead to clogging, causing blood cells to stick together and that sort of thing.

But clearly, the heart rate and blood pressure effects of nicotine were well-known and maintained and were of concern just as they are of concern now.

Q. Okay. So, if a witness who was testifying for the plaintiffs in this case came here and testified and told the jury that nicotine in cigarettes is not a major cause of injury, that it's not a clinically significant health risk, nicotine itself, is that something that you'd disagree with, that you have a basis to disagree with?

A. I -- I would not comment -- I don't know at this point in terms of the latest views on that.

Q. Okay. People can get nicotine without a prescription; can't they?

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A. That is -- well, you can now. I guess you can buy -- you can buy gum without a prescription.

Q. You can buy patches?

A. I don't know about patches, but you can buy gum.

Q. Are you aware of any -- any abuse of nicotine patches or nicotine gum?

A. Yes. I know -- abuse. I know people that are addicted to the gum. They've given up smoking. They've been chewing gum for years. They cannot give up the gum. So I would call that an addiction.

Q. Okay. Other than --

A. Unable to function without it.

Q. Other than your own experience with somebody you know or some people you know, do you know whether there are any scientific studies that say that nicotine in patches or gums that are available over the counter at the corner drugstore is a subject of abuse?

A. The patch was specifically designed to try

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and prevent abuse potential because of the way it delivers nicotine. It delivers it very slowly and in a very gradual fashion.

What's known about smoking and with the gum, if you chew it the right way or the wrong way, is that you can deliver a bolus of nicotine very quickly. You

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can get a big punch into your blood and into your brain. That's what's believed to be important in maintaining the nicotine abuse. And you can do that with the gum if chewed in a certain way.

Q. All right. Forgive me, Doctor, but my question was, do you know of any reports in any scientific literature --

A. Are there reports? These issues are discussed in the literature. I can't tell you whether someone has actually gone out and definitively decided that gum-chewing or patch use is considered an addiction.

Q. Just so I can finish my question --

A. These are warnings -- I'm sorry.

Q. You were jumping to the answer before I got to the question, so let me go back and try the question again. Okay.

We've established that you can get nicotine gum over the -- over the counter and without a prescription; right? And you can get nicotine -- you're not sure about nicotine patches.

A. I don't know about patches. I can only speak for Maryland, in my local drugstore, that you can buy the gum.

Q. Now, my question was, are you aware of any

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studies that have been done, scientific studies reported in the scientific literature, that conclude that there is any abuse, any significant abuse of those products that are now available to anybody who wants to walk into a drugstore and buy them?

A. I have not, no.

Q. You said over the two and a half years that

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you worked in the lab, you tested over close to 100 analogs; right?

A. We test -- there are over 100 analogs generated. We tested many of those.

Q. You were doing the testing for the brain affect. You weren't doing the cardiovascular testing; correct?

A. Correct.

Q. In fact, one of the people that was doing the cardiovascular testing was Dr. Leo Abood --

A. Correct.

Q. -- from the University of Rochester, and he was one of the outside consultants that the company was using?

A. Correct.

Q. Correct? Okay.

And how about Jack Eagle from the Medical College of Virginia; was he also doing cardiovascular

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testing?

A. He had had a contract with Philip Morris to do some of that also. It terminated by the time I was there or through most of my time there.

Q. Do you know whether subsequent to that he also did further cardiovascular testing on nicotine analogs?

A. I do not know.

Q. Now, developing a successful nicotine analog, one that worked -- fulfilled all of the objectives and didn't have a downside, would have been a significant competitive advantage for Philip Morris if the other companies didn't have one; right?

A. Competitive -- now you're asking me about business and commercialization aspects or about --

Q. Well, let me ask you this: Did the R&D --

A. Marketing --

Q. Did the R&D scientists, those of you who were there, because all I want to ask about is what you knew at the time, did the R&D scientists think that development of a successful analog would be a competitive breakthrough for Philip Morris?

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23 A. Development of an analog would have been
--
24 would have met one of the criteria that -- would
have
25 met an objective of the research center for Philip

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18319
1 Morris. Whether they considered that competitive
2 versus RJ Reynolds or some other company or only
3 concerned about their own aspects, I can't comment
on
4 that.
5 It certainly was something they wanted
done
6 to ensure the continued use of their own product.
7 Q. Sure. Because if nicotine had been
banned,
8 they would be able to -- sorry.
9 If nicotine had been banned, they would
have
10 been able to continue selling the product, using
the
11 analog, and if the other companies hadn't been
12 successful, that would have been an enormous
13 competitive advantage; right?
14 A. I suppose. I mean, again, that gets
beyond
15 anything I worked on.
16 Q. Now, you said you saw some of the
17 cardiovascular -- well, before I get there, I
think you
18 said there were two candidates that you thought
met the
19 goals of the program, two prime methylnicotine and
four
20 prime methylnicotine; correct?
21 A. Correct.
22 Q. And the goals of the program, as you
23 understood it, were maintaining the same -- the
24 physiological effects of nicotine and decreasing
the
25 cardiovascular concern.

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18320
1 A. Right. Keep the rats responding and
2 eliminate the cardiovascular toxicity.
3 Q. Right. Now, you didn't see, yourself,
4 personally, all of the data on the cardiovascular
side;
5 did you?
6 A. All of the data? Probably not, because
if
7 you're not doing the studies yourselves, rarely
does
8 anybody see all of the data. We saw the data that
was
9 summarized and provided by Dr. Abood, who was
primarily
10 responsible for generating those for the company.

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Q. And did you see Dr. Eagle's data?
A. I don't -- I don't recall seeing his data.
His data was not -- and he was not a regular attendee
at the analog meetings.
Q. Now, if you wanted to use an analog in place
of nicotine, you'd have to take the nicotine out first?
A. If you wanted to use an analog in place of
nicotine?
Q. Yes.
A. Presumably you would have to take it out, if
you were going to be replacing it.
Q. Sure. That's just common sense, right.
And I think you said, in response to
questions that were asked by plaintiffs' counsel, that
you were aware that experimentally, in 1984, Philip

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Morris was able to take nicotine out of -- out of its
experimental cigarettes in the laboratory; right?
A. Philip Morris could produce cigarettes with
varying amounts of nicotine, including no nicotine, so
they had the technology to totally remove nicotine from
cigarettes.
Q. And that was technology that you referred to
as having been available in the experimental
laboratory; isn't that right?
A. No. The laboratory would request these
cigarettes, and those cigarettes were produced outside,
and then sent back in. I mean, outside of the
behavioral research unit.
We didn't make our own cigarettes, or Frank
Ryan didn't make those cigarettes. They were made
somewhere else in the company.
Q. Do you know where they were made in the
company?
A. I do not.
Q. Do you know if they were made somewhere other
than the research and development center?
A. You mean physically in the R&D building or
next-door in manufacturing?
Q. Yes.
A. Or next-door in -- no, I have no idea.

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18322

Q. And you're not aware, are you, in those cigarettes, in those experimental cigarettes where all of the nicotine was removed, other things came out along with the nicotine?

A. Was I aware? Just from my discussions with Frank Ryan and Bill Dunn that they had denicotinized cigarettes, and they were testing for the affect of nicotine manipulations with the understanding that it was simply or strictly nicotine that was being manipulated.

Q. And the question, Doctor, was, do you know, when those experimental cigarettes were produced without nicotine, whether nicotine and nicotine alone was taken out or whether other things, the experimental process that was used to take nicotine out, also extracted other things with it?

A. I only know what I was told by the researchers, and they -- they claimed that it was nicotine only that was removed.

Q. Did you ever ask that question? Did you say -- did you ever ask the question: Are you only taking out nicotine, or are there other things in the tobacco that's coming out along with it?

Do you remember that?

A. Well, no, because there are so many studies

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18323

being done that they would selectively also alter other aspects of the cigarette, so I had faith in the researchers, that when they were -- say they were manipulating a particular aspect, that's what they were doing.

Those might have been nicotine studies. Others would have altered flavor. Others would alter the feel and heft of the cigarette.

Q. Doctor, do you know whether in 1984 there was any commercial process that was available to Philip Morris to extract nicotine and nicotine alone from cigarettes?

A. Commercial process. You mean large-scale manufacturing?

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Q. Right. That's how cigarettes are made, large scale in manufacturing, right?
A. No. I don't know that.
Q. So you -- in terms --
A. I don't know if there's a difference between commercial processing and the experimental cigarette production, if that's what you're asking.
Q. So whether or not Philip Morris had any capability in a commercial production, large scale, large volume production, to extract nicotine from cigarettes as opposed to work in the laboratory is

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something you just don't know; correct?
A. That is correct.
Q. Now, are you aware of whether or not the use of 2-prime methylnicotine or 4-prime methylnicotine would increase or not increase the level of tobacco-specific nitrosamines in a cigarette?
A. I don't know.
Q. Okay. Questions like that would have needed to be answered before an analog could be used in a cigarette; was it not?
A. Not necessarily. I don't know what questions were asked or answered by the company. It certainly didn't come up at our analog meetings.
In fact, in all of the meetings I discussed within our research division that discussed nitrosamines and other compounds, I never once heard any concern about those compounds being in smoke and that the company should try and get those out.
Q. Well, if the company was going to proceed with an analog, you would expect that it would be interested in determining whether or not the use of the analog had any kind of synergistic effect with other aspects of the cigarette; would you not, when it was -- when it was burnt, when pyrolysis took place?
A. Again, you're getting beyond things I dealt

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with. But it depends what you're interested in. If

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your goal is to keep people smoking that cigarette with nicotine in there, that was the goal we were working on within the analog group.

Never once was there a concern there would ever be or were these other harmful aspects of cigarette smoke that needed to come out or we had to make sure two prime methyl wasn't ten times more cancer-producing than nicotine in tobacco smoke. I never heard concern expressed that way.

Q. Doctor, you just said at the beginning of that answer that I was getting into areas that you weren't concerned about.

So, it was not within your area of responsibility, as a behavioral pharmacologist, working in the rat laboratory doing the experiments you were doing, to be concerned with the level of tobacco-specific nitrosamines in smoke?

A. Correct. It was not an area I worked in, but I think your question said was it ever discussed, and I never heard it discussed.

Q. But you weren't everywhere within the research and development center; were you?

A. No. Most of it was in the behavioral pharmacology or in the general division meetings where

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these nitrosamines and other compounds were discussed.

Q. Now, you said there were also questions about FDA approval for analogs; true?

A. Yes. Correct.

Q. Okay. And among the research scientists, questions were discussed about, for example, whether the Federal Drug Administration -- Food and Drug Administration would have to approve an analog before it could be used in a cigarette; right?

A. That was a question that did come up at the analog meetings.

Q. And you and your fellow --

A. Nobody seemed to know the answer to that.

Q. Pardon?

A. Nobody seemed to know the answer to that.

Q. Right. And you and your fellow

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scientists
17 talked about the fact that nobody knew the answer to
18 that. Nobody knew whether the company wanted to get
19 FDA approval or they didn't want to get FDA approval;
20 right?
21 A. Correct.
22 Q. And you never heard how, if at all, those
23 kind of questions were resolved?
24 A. Correct.
25 Q. And you were not involved in any decisions by

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1 the company to use or not to use analogs in a
2 commercial cigarette; correct?
3 A. Correct.
4 Q. Okay. And you're not aware of any firsthand
5 knowledge that any analog was actually used in a
6 commercial cigarette?
7 A. No. I never found out whether they were
8 used, although the clear intent of that group to
9 discuss these was to find the compounds that we could
10 recommend as being the best analogs, and then hand it
11 off to the next group.
12 MR. HEIM: Your Honor, if you want to -- if
13 you and/or the jury would like to take a short break
14 here, we could do that.
15 THE COURT: Do you want to take a vote for a
16 break?
17 Okay. Break.
18 All right. We'll take a short break.
19 (The jury exited the courtroom.)
20 (Brief recess.)
21 THE COURT: Okay. Bring the jury out, I
22 guess.
23 Are you going to be basically the rest of the
24 afternoon?
25 MR. HEIM: No, sir. I'm not going to be very

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1 long at all.
2 THE COURT: Anybody else going to have
3 cross --
4 MR. HEIM: No, sir.
5 THE COURT: -- for this witness.
6 Okay. I'm trying to figure out how to --

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what to do with the balance of the time.
We'll find something.
MR. ROSENBLATT: The video man is here.
THE COURT: On which one?
MR. ROSENBLATT: Goldstone.
THE COURT: That's going to be a problem.
MR. MOSS: We have to go over those.
THE COURT: We're going to have to argue Goldstone. I know Mr. Reid wants to talk about it.
All right. Let's finish up with this witness anyway.
All right. Let's bring the jury out.
(The jury entered the courtroom.)
THE COURT: All right. Be seated, please.
All right. Let's resume.
MR. HEIM: Yes, sir.
BY MR. HEIM:
Q. Dr. Mele, I'm switching gears. I'm switching to a different topic here for a few minutes.

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And the other research effort that you testified about, I think I covered nicotine and the analogs. I want to talk about acetaldehyde for a couple of minutes. Okay.
Now, I think you testified that acetaldehyde is a compound that is found in cigarette smoke, but it's also exists in nature. You can find it in foods, like yogurt; right?
A. Correct. That's my understanding.
Q. Okay. And your research was that -- your research was that you found that rats would self-administer acetaldehyde when you put it in solution just as they would nicotine; correct?
A. Correct.
Q. And you found that when you combine the two, nicotine and acetaldehyde, you got more self-administration than when using either one separately; correct?
A. Correct.
Q. So, in effect, you got more -- you got more reinforcement than you did if you used each one of them by themselves?
A. You could characterize it that way. That would be fair.
Q. Now, your work showing that there was more

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18330

self-administration when nicotine and acetaldehyde was used in combination, that was, I think, a study that you did with four rats; is that correct?

A. Yes. If you're referring to the -- this came up clearly at the deposition in some detail, and if you're referring to that, the eight and the four --

Q. Whichever.

A. -- whatever you want to say.

Q. I don't care whether you want to make it eight or four.

A. Right. We started with eight and ended with four, and Mr. Otero had a big problem with it.

Q. Right. I didn't --

A. Neither did I.

Q. You started with eight and ended up with four. It was somewhere in the neighborhood of four to eight rats; right?

A. Right. It definitely demonstrated proof of the concept that the two compounds together had this synergistic effect.

Q. You already said, I think, earlier this afternoon that your work with nicotine did not show in those studies that you did that nicotine caused physiological dependence in rats. And my question is, your work with acetaldehyde also showed that that was

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18331

true, that acetaldehyde did not cause physiological dependence in rats; correct?

A. We certainly looked at the nicotine/acetaldehyde combinations. I don't recall whether we looked at acetaldehyde alone, but we probably did. And the combinations did not produce a physiological dependence. Again, using the same tests and procedures that were ineffective in showing nicotine physiological withdrawal were also ineffective in showing physiological withdrawal with the combinations, again, I think, indicating our procedures were not as sensitive as they should -- they could

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have
been.
Q. But at least as far as the data that you were
reporting on in your reports to the company, you were
showing nicotine by itself didn't create physiological
dependence. Acetaldehyde by itself didn't create a
physiological dependence --
A. That's probably true, but I'd have to check
the documents on that, or you probably have those.
Q. And you -- and the combination --
A. The combination.
Q. -- of those two did not create a
physiological dependence; right?
A. Correct. Again, in those initial studies

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that we ran.
Q. And am I right, Doctor, that you -- you, in
your days that you were at Philip Morris, you never
heard anyone at Philip Morris say that the company
planned to use acetaldehyde in the commercial
production of cigarettes?
A. Anyone?
Q. Well --
A. I mean, this was a topic that was discussed
at the analog meetings. Victor DeNoble and I talked
about it frequently.
The research people talked about it, but not
the -- the guys who actually made the cigarettes
themselves for sale.
Q. Okay. So it would be fair to say that you
didn't know of any decisions that were being made by
the company or that ever were made by the company to
use acetaldehyde in the commercial production of
cigarettes while you were at the company?
A. That -- that is correct. I do not know how
they handled that data.
Q. Okay. And you have no firsthand knowledge
that your research on acetaldehyde and nicotine was
ever used to modify any commercially sold cigarette?
A. My only knowledge was reports in the press

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18333

showing --
Q. Doctor, I want you to answer my question about your knowledge while you were at the company.
That's the way I asked the question.
A. Well, right. At the company, when I was there, no, other than reports I read in the press, that acetaldehyde levels were increasing --
THE COURT: You can't talk about what the media might have shown.
BY MR. HEIM:
Q. So the answer to my question is no, correct?
A. No. No one at the company ever -- I never heard anybody at the company say they were -- they had manipulated acetaldehyde levels in a commercial cigarette.
Q. All right. Now, Doctor, you testified that you were told by Jim Charles that the company had made a decision to close the behavioral pharmacology lab for business reasons; right?
A. Right. Right.
Q. Okay. And you also testified that in the beginning -- I'm sorry. I may be wrong about that -- that in about mid 1993, a number of lawyers from the law firm of Shook, Hardy and Bacon had come to visit the laboratory?

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18334

A. '83, yes.
Q. '83, yes. Did I say '83?
A. You said '93.
Q. I said '93. Four rats, eight rats. '93.
A. I'll give you the decade.
Q. I'm sorry. I meant '83.
A. That's all right.
Q. And I think you said they spent time looking over your documents and your files, and that there was a presence of lawyers from the law firm of Shook, Hardy and Bacon there over a period of a number of months?
A. Correct.
Q. All right. And you said that there had

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been
some litigation against the company back in and around
that time?
A. Correct.
Q. Okay. Now, Doctor, am I right that you don't
know -- you don't know, Dr. Mele, whether the reason
the lawyers were present during that period of time was
to look through --
MR. ROSENBLATT: Well, excuse me. If we start off with the premise he doesn't know, the
question must contain speculation.
THE COURT: Yes. I agree.
So the question is do you know why they were

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there.
MR. HEIM: Okay.
THE COURT: And what purpose. And if he doesn't know, he doesn't know. If he does know, then
he can tell us.
BY MR. HEIM:
Q. Do you know whether the purpose that those
lawyers were there had to do with the defense of that
litigation that was being brought against the company?
Just yes or no.
A. I was told that.
Q. And do you know whether --
A. By Jim Charles.
Q. Okay. That's fair enough.
And do you know that, since they were defending that litigation, that what they were doing
was responding to requests for documents that plaintiffs had made in the litigation?
MR. ROSENBLATT: Objection.
THE COURT: That would be speculation unless
he knows. If there was no knowledge --
BY MR. HEIM:
Q. Do you know, Doctor?
A. I don't know. I don't know if that's what
they were doing.

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THE COURT: Enough said.
MR. HEIM: All right. He doesn't know.
BY MR. HEIM:
Q. You don't have any -- you didn't have any

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conversation with Mr. Charles about that subject?
A. The specific --
THE COURT: I really don't want to explore that any further, based on conversations we've had.
MR. HEIM: All right.
BY MR. HEIM:
Q. You left the company in November or December, was it?
A. My last day of employment at Philip Morris was December 31st, 1984.
Q. And you were paid up until the day you left?
A. Correct.
Q. And you had an office at the company there?
A. I had an office.
Q. Did you have secretarial support?
A. Yes. We were able to use the personnel group to job search.
MR. HEIM: That's all. Thank you.
THE COURT: Okay. Any redirect?

REDIRECT EXAMINATION

BY MR. ROSENBLATT:

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Q. You had an office at Philip Morris in December of 1984, but did you have any job function?
A. Look for a job and eat lunch.
Q. Look for a job and eat lunch?
A. Basically it. Keep a low profile.
Q. Who told you to keep a low profile?
A. We were working with the personnel manager, Mr. Jim Harding -- Harden or Harding -- that was overseen by Jim Charles. We touched base with him on a weekly or so basis to see how we were doing. We were basically told, go over here, we were -- a warehouse that had been converted to some offices, given desk and phones, and said, find a job.
Q. Find a job within Philip Morris or --
A. No, no.
Q. -- out --
A. Outside.
Q. Outside of Philip Morris.
From the time the laboratory was closed, from the time you were advised of that in April of 1984, until your last day at the company at the end of December of '84, were you ever given anything meaningful to do or any real job position at

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Philip
24 Morris?
25 A. We had no duties. We had -- again, our

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18338
1 badges were removed. We were told where we could
and
2 could not go and what we should be doing.
3 Q. Now, this concept of reinforcement,
which
4 we've been over, where the rats press the levers,
this
5 is a conscious, voluntary act on the part of the
rat;
6 correct?
7 A. He presses the lever, yes.
8 Q. Okay.
9 A. Yes.
10 Q. Okay.
11 A. I have a problem with the conscious act
of
12 rat.
13 Q. I don't want to get into metaphysical.
14 A. I don't want to get into what the rat
thinks.
15 They move around.
16 Q. Nobody knows what the rat thinks, not
even
17 Philip Morris.
18 MR. HEIM: Not even the plaintiffs.
19 THE COURT: That's known as tit for tat,
but
20 I don't know if you're talking about rats or what.
21 MR. ROSENBLATT: Well, I'll restrain
22 myself --
23 THE COURT: Go ahead.
24 MR. ROSENBLATT: -- from the next
obvious
25 line.

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18339
1 THE COURT: Let's move on.
2 BY MR. ROSENBLATT:
3 Q. Within a 24-hour period, what is the
number
4 of times that these rats would be hitting the
lever for
5 nicotine?
6 A. Roughly 100, 80 to 120, somewhere around
7 there. About a hundred times.
8 Q. Do rats like cocaine?
9 A. Rats like cocaine.
10 Q. They'll hit a lever for cocaine?
11 A. Uh-huh.
12 Q. Will they do it for LSD?
13 A. No. Rats are smart. Again, there are
some
14 things rats will not self-administer that humans
will.

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Hallucinogens, such as LSD, are things that rats will not abuse. Whatever it does to them, they don't like. Humans, as you know, will. So that's part of that conservative aspect, again, of a rat model where a drug is self-administered.

Q. The concept of nicotine being a positive reinforcer means exactly what?

A. In the strictest definition, a positive reinforcer is something that maintains behavior that produced it. If you do something and you get it, this reinforcer, you're more likely to do it again in the

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future.

We like to say the rats work for it, or the people work for it. But in the scientific definition, it's just as I just said, it leads to the behavior being repeated that created it.

Q. Dr. Mele, you said in response to Mr. Heim that you were not allowed to do studies comparing nicotine and cocaine. What reason were you given as to why you could not make those comparison studies?

A. We weren't allowed to bring in any controlled substance. A controlled substance involves all your drugs of abuse. Drugs that have abuse potential are controlled by the Drug Enforcement Agency and are categorized in certain ways.

We were not allowed to have controlled substances in the lab, because, again, because of the associative nature of a controlled drug and nicotine. We were just told we cannot have those two things in the same room. It was a bad association.

Q. Mr. Heim asked you about a question that the president of Philip Morris, Shep Pollack, had asked you on the subject of addiction, on -- during the time of the VIP tour of Mr. Remmington, when he made the comment that everyone at Philip Morris knows that nicotine is addictive. Did you agree with that --

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MR. HEIM: Objection, Your Honor.
Q. -- or disagree with it?
MR. HEIM: Mischaracterizes the testimony.
THE COURT: I'll sustain that objection as to dealing now with everybody.
BY MR. ROSENBLATT:
Q. Did you agree with Mr. Remmington's comment to the effect that people know -- or at least some people at Philip Morris accept the premise that nicotine is addictive?
A. Certainly within the science group we worked under, I believe there was no question that that was the case. That was the whole aspect of the analog program.
There may have been issues that we didn't have all of the data in place that we would have liked to have had. But, again, we weren't -- we weren't trying to prove this point or disprove it. We were trying to come up with an analog that would keep people smoking the cigarettes. That was our -- this question of addiction or dependence was assumed. Otherwise, the analog program makes no sense.
Q. Now, you were asked some questions about this draft of the 1984 annual report. And in the very first paragraph, the statement is made: We have continued to

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use the self-administration technique to further characterize nicotine's reinforcing effects, to identify nicotine analogs that may have positive reinforcing value, and to examine the relationship between the reinforcing effects of nicotine and acetaldehyde.
What did you learn about the relationship between the reinforcing effects of nicotine, together with acetaldehyde?
A. Well, when you put the two compounds together, we had this synergistic effect. Again, the combination produced more self-administration than either of the compounds alone. And if you just tried to add the two effects together of the individual compounds, the effect was much greater.
I mean, that is by definition what they

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call
17 synergism or potentiation in pharmacology.
18 The whole was greater than the sum of
the
19 parts was one way to look at it.
20 Q. The sum of nicotine and acetaldehyde
together
21 were greater than either one individually?
22 A. The whole was greater than the sum. If
you
23 add nicotine at this level and acetaldehyde at
this
24 level, if you just added them together, I mean,
they
25 would be at this level, but what the rat actually
did

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18343
1 was at this level. So the two drugs together had
this
2 super-additive or synergistic effect.
3 Q. Now, you were asked some questions about
this
4 concept of Philip Morris being worried about
whether
5 nicotine might be banned. Banned by who?
6 A. Well, the question that came up was the
FDA.
7 Q. Well, did the FDA back in the '80s, or
for
8 that matter, today, have jurisdiction over
cigarettes,
9 over nicotine?
10 MR. MOSS: Your Honor, we're getting
into an
11 area that we talked about before, this --
12 (The following proceedings were had at
13 sidebar:)
14 MR. MOSS: Two things. One, the man is
here
15 as a fact witness. He's not an expert on the FDA.
16 Number two, the FDA's position is a
matter of
17 law, whether they have jurisdiction or not.
18 THE COURT: Yes.
19 MR. HEIM: It's irrelevant, actually,
20 whether --
21 MR. MOSS: Well, that's the -- it has
nothing
22 do with any issue we're trying here.
23 THE COURT: Well, the whole issue with
the
24 FDA came up in the sense of what happened if it
was
25 shot down by the FDA.

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18344
1 MR. MOSS: He's already talked about
that.

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MR. ROSENBLATT: Counsel opened the door, asked about -- he asked specifically was Philip Morris worried about nicotine being banned by the FDA. And then there was also questions about the concern of Philip Morris about whether some of these analogs might be banned --

THE COURT: Okay.

MR. ROSENBLATT: -- by the FDA.

THE COURT: I don't know if he's in a position to answer the question you posed, however.

MR. MOSS: Of course not.

THE COURT: Which is whether the FDA had a jurisdiction, because that was the subject matter of a lawsuit --

MR. MOSS: Yes, sir.

THE COURT: -- that grew out of this thing.

MR. MOSS: We gave you a copy of the opinion.

THE COURT: Maybe at that time everybody assumed that they did. And if they were working under the assumption that we assumed the FDA had jurisdiction, therefore, they had authority, that's one thing. But whether they actually do or not is another story.

So, where are you going with this? Just the

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issue that if the FDA could ban nicotine, they could also ban an analog?

MR. ROSENBLATT: No. No. Just --

MR. MOSS: Just once again --

THE COURT: It came up, so --

MR. ROSENBLATT: Yes. It came up, and I wanted to show that no one was worried about that. The FDA had no jurisdiction to ban --

MR. HEIM: He testified they were worried. He said that they were -- that it was a concern and that it was a possibility.

THE COURT: You would have to ask him, does he know whether the FDA had jurisdiction. And his answer is going to be yes, I know, or no, I don't. And if he doesn't know, that would be supposition.

MR. MOSS: But even if he --

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17 THE COURT: Now, this --
18 MR. MOSS: There's really no foundation.
19 THE COURT: This is really a policy
20 decision-making process which is outside of his
21 expertise.
22 MR. MOSS: The man is here as a fact
witness,
23 Judge. We're getting so far outside his field.
We've
24 spent, with a fact witness, almost two days now,
and
25 clearly most of his testimony has not been as a
fact

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18346
1 witness.
2 THE COURT: That's what I'm -- I don't
know
3 exactly where you're going with this thing. If
the
4 FDA -- if he thought the FDA might be in a
position to
5 have some restriction on analogs, you could ask
him
6 that. If he thought they did, that's what he
thought.
7 MR. MOSS: What would be the relevance
of
8 that?
9 THE COURT: I don't know. No. The
relevance
10 is you brought it up. The fact that that's why
they
11 were looking for an analog.
12 MR. ROSENBLATT: I simply -- I simply --
13 THE COURT: That would be relevant
material
14 at this point. Now, if you're going to say, well,
even
15 if you developed an analog --
16 MR. ROSENBLATT: No. In all honesty,
I'm not
17 interested in pursuing that point. I'm interested
in
18 establishing that, during the whole period while
he was
19 there, they never had any involvement with the
FDA.
20 THE COURT: Involve --
21 MR. ROSENBLATT: He knows. He knows.
His
22 research lab had zero involvement.
23 THE COURT: Well, ask him that question.
24 MR. ROSENBLATT: I will.
25 MR. HEIM: Whether his research --

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18347
1 THE COURT: I'll sustain it for this
purpose.

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MR. MOSS: We object to the question that you just said he could ask.
THE COURT: So what else is new?
Overruled.
MR. HEIM: All right.
THE COURT: They objected to the question you're going to ask, and I overruled it.
MR. ROSENBLATT: It pays to hang around.
(The sidebar conference was concluded, and the following proceedings were held in open court:)
BY MR. ROSENBLATT:
Q. Dr. Mele, during the period of time that you were employed as a research scientist at Philip Morris in the laboratory, from November of '81 until the time it was summarily closed in April of 1984, did you ever have any involvement with anyone from the FDA, the Food and Drug Administration?
A. Myself directly?
Q. Yes.
A. No. No.
Q. Did anyone, to your knowledge, did anyone from the Food and Drug Administration ever come to the laboratory and get a VIP tour --
A. No.

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Q. -- or inspect the laboratory?
A. No.
Q. Now, with respect to the lawyers from the law firm of Shook, Hardy and Bacon that were on the premises of the laboratory for several months, prior to the time that it was closed, do you know one way or the other whether those lawyers, who were in Richmond at the laboratory, had any active role whatsoever in defending litigation?
A. I do not know.
Q. You just know they were lawyers and they were --
MR. MOSS: Your Honor --
Q. -- in the lab, correct, for months?
MR. MOSS: That's been asked and answered, Your Honor.
MR. HEIM: It's also leading.
THE COURT: The answer is either yes or no.

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A. Yes.
THE COURT: All right.
BY MR. ROSENBLATT:
Q. How many people would generally attend the analog meetings?
A. Five to ten, a dozen.
Q. Scientists?

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18349

A. Yes. All scientists.
Q. Organic chemists?
A. Organic chemists.
Q. And the analog meetings were held how frequently, during the period of time you worked in the lab?
A. Oh, roughly monthly.
Q. Dr. Mele, at any analog meeting that you ever attended, and during any discussion that was ever held, did any of these Philip Morris scientists ever at any time during any meeting in that two-and-a-half year period express any interest whatsoever in the health of Philip Morris smokers?
MR. MOSS: Objection, Your Honor.
BY MR. ROSENBLATT:
Q. Did that come up?
THE COURT: I'll overrule the objection.
BY MR. ROSENBLATT:
Q. You can answer it.
A. Never once in my whole time at the company did I hear any concern for the customer, other than one scientist who was complaining that he was repeatedly -- repeatedly having his research changed in direction any time he came upon some hot research.
MR. HEIM: Your Honor, I move to strike that

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18350

answer.
MR. ROSENBLATT: Thank you, Doctor.
THE COURT: Overruled.
All right. You may step down, sir.
Thank you very much.
Okay. I guess I'm going to have to talk to the lawyers for a second.
(Discussion off the record.)
THE COURT: All right, folks. We've been

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discussing the scheduling, and we still have some stuff
that we have to do, and you'll get a break today. So
I'll let you go home a little early.
Anybody protests?
All right, folks. We'll be reconvening tomorrow at the usual time, 9:15.
Same rules apply.
(The jury exited the courtroom.)
THE COURT: Okay. You can all be seated.
MR. ROSENBLATT: Apparently some of the videographer's equipment was stolen.
THE COURT: Stolen?
MR. ROSENBLATT: The VCR.
THE COURT: From where?
MR. ROSENBLATT: Out of the courtroom. Out of the other room.

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THE VIDEOGRAPHER: My VCR.
THE CLERK: In the media room?
THE VIDEOGRAPHER: Yes. Leaving it there for convenience of getting it back here.
THE COURT: When did you first bring it in?
THE VIDEOGRAPHER: It's been there for weeks.
(Discussion off the record.)
MR. SCHNEIDER: Judge, I did bring Thomas Sandifur's deposition. Plaintiffs added about double the designations on Friday night. We went through it, got it done and color-coded.
MR. MOSS: Isn't that nice?
THE COURT: Sandifur.
MR. SCHNEIDER: Yes. It's all color-coded for you.
THE COURT: Now, which one do you want to talk about first, Goldstone or Bible?
MR. HEIM: Goldstone.
MR. REID: Goldstone.
MR. ROSENBLATT: I would think Bible because -- but it doesn't matter. It doesn't matter. Bible was on the tip of my tongue.
THE COURT: Are you doing both?
MR. REID: I'm just doing Goldstone.
MR. ROSENBLATT: Fine.

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THE COURT: Now --

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MR. REID: I thought I would like to make some introductory comments about our motion before I get in --

THE COURT: You might as well, because your motion is to just disregard the whole thing.

MR. REID: Exactly. Exactly.

And I don't want to belabor the point. It's laid out thoroughly in the paper that we filed.

But as the Court is aware, Mr. Goldstone is the executive of Nabisco. He is not an executive of RJ Reynolds Tobacco Company.

We've cited a number of cases in Florida that --

THE COURT: Wait. Wait. Let me just see here. Okay. He is the chairman and executive officer at the time of the deposition of RJR Nabisco.

MR. REID: The parent, a different corporation.

THE COURT: The question, did he ever work at RJR or --

MR. REID: No, sir. In fact, he -- as you'll see, he had only worked in our -- in Page 2 of our memo, we have some of these facts laid out with cites. It's called Motion in Limine of defendant.

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18353

This deposition, just to give you background, Your Honor, was taken in the Attorney General's lawsuit.

THE COURT: Yes.

MR. REID: And he became the head of Nabisco in 1995. Before that, he was a corporate lawyer with a big law firm in New York. He wasn't involved with any of the companies before 1995, which, of course, is after this case was filed.

He was not a scientist. He's a mergers and acquisitions lawyers.

In the deposition, they asked him a lot of questions about the history and corporate activity before he was ever associated with the parent. And the important thing to remember is that he is not connected with the party who is in this litigation.

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17 He is not connected with RJ Reynolds Tobacco
18 Company. He is the chairman of the parent.
19 And in our memo, we cited a number of Florida
20 cases that talk about the corporate division, Florida
21 cases. We also cite cases from around the country
22 where this specific division has been made. And in
23 fact, I think one lawyer was sanctioned because he
24 added the parent. They said they shouldn't have been
25 in the tobacco cases. We've attached those to our

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18354
1 memo.
2 Not only does Florida follow the division
3 between the two companies, but there is case law around
4 the country where this very question has come up. That
5 is just a general overriding concept I think we ought
6 to keep in mind as we go through this.
7 THE COURT: Just to let you know, because of
8 testimony taken this morning, I haven't had time to
9 read this. It was placed on my desk today.
10 MR. REID: Yes. The reason -- let me tell
11 you why. The motion or our objections --
12 THE COURT: The motion.
13 MR. REID: One of the problems was, of
14 course, as with the other situations, we got these new
15 designations late Friday.
16 THE COURT: I understand that, but now
17 you're -- it's not as if I had time to read it and
18 digest it.
19 MR. REID: Would you rather put this one off
20 until --
21 THE COURT: Well --
22 MR. REID: Maybe I should just give you a few
23 other general concepts.
24 THE COURT: Go ahead and give your argument,
25 and we'll see where we go. If I feel I can't make a

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18355
1 decision on that basis, I'll let you know.
2 MR. REID: Apparently Mr. Heim tells me this
3 is going to be a lot of the same argument with

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Mr. Bible, as well. He's going to have a lot of the same corporate objections.
THE COURT: We might as well air it out today and see where we go.
MR. REID: In his deposition, Your Honor, generically they ask him questions about causation of cancer. They ask him questions about warning labels and what is he going to do in the future as chairman of Nabisco, not as a tobacco company employee.
They ask him about the current policies of tobacco, the parent, current, right now, today. And they ask him about corporate behavior, not only of the company that he's been associated with for a year and a half when he was deposed but for Reynolds Tobacco, which he is not associated with at all.
So that's the reason we object to any of this deposition, because there's no way to cut it down in any way to have any left that would be appropriate.
As I mentioned before, the first point, these are separate corporations; there's no dispute about that. He's the chairman of a different company. They're not a party to this case.

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Secondly, he's not a scientist at all.
THE COURT: Let me just ask you a question. I'm a little bit confused here. And I do understand what you're saying as far as that goes.
I was thinking back over it, some of the questions that were asked, as I read through this thing, and take Page 9, for example. And they're talking about RJ Reynolds doing something.
Okay. Like the question: I would ask you to assume that in January of 1954, RJ Reynolds endorsed an ad about The Frank Statement.
We're talking about --
MR. REID: Sure, The Frank Statement.
THE COURT: And again on Line 16, 17: Would that be the philosophy of RJ Reynolds today?
So I was somewhat confused as to what we're

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talking about there, as to whether it's RJ Reynolds Tobacco or we're talking about RJ Nabisco.

MR. REID: Those questions are all talking about the tobacco company, because that's the company.

THE COURT: I know they are.

MR. REID: And as you go on, he explains that it's a separate company, it's a subsidiary and so forth.

That's really the basis. They're asking him

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a lot of questions about what the tobacco company meant when it signed the Frank Statement, what's the view today of the tobacco company about The Frank Statement.

They've taken the deposition -- in fact, they've read to the jury the tobacco company executive --

THE COURT: But he says --

MR. REID: -- Mr. Schindler.

THE COURT: But the answer is: I do think Reynolds is our tobacco company. As you know, we own 100 percent of it.

And then he goes on and says: I think when you sell a product like cigarettes, public health has got to be a paramount concern.

He has some knowledge.

MR. REID: He may have some opinions about things, but the question we're dealing with here is the legal issue as to whether what he says is an admission by a party in the case. That's the exception they're going to try to use as we go through this. And it's not.

If you continue to look at this, Your Honor, you'll also -- once you get beyond his testimony about the problem that's created by the two separate companies, the two separate corporations, you get into

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all of the questions about science. And asking

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him his
opinion about causation and do you think it's a cause
of cancer and opinions about that.
And then they asked him for -- a lot of questions about what somebody did, what somebody thought in the tobacco company, long before he was ever
associated with any company, back when he was eight
years old, in fact, The Frank Statement.
So they ask him a lot of questions about individual knowledge that he might have about something
that somebody else did long before he was around. So
he'd have no firsthand knowledge of that.
And then they'd go to the other extreme and
ask him about in 1997, does the parent company plan to
do something in the future, or does the parent company
plan to make the tobacco company do something in the
future?
He talks about, are you going to do some sort
of warnings, which would clearly be preempted, but he
talks about some sort of plans about warnings that you
might have in the future as the chairman of the parent
corporation.
So, when you go through each of those, that
is, you've got separate companies, you've got his
personal history of lack of knowledge of all of these

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things, you've got his lack of any scientific basis,
any basis for answering these questions about
causation, and the fact that he has no personal or
firsthand knowledge of many of the things that happened
many years before he was associated with Nabisco, you
have a situation that it ought to be excluded.
Some of the legal issues that I raised, Your
Honor -- first of all, to the extent if you look at
Rule 90.803, this can't be an admission, because he
doesn't speak for the company that is the party here.
We cited Florida cases, Dania Jai-Alai and

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12 the Ferris case, and the Factory Insurance Association
13 case, which talks about parents and wholly-owned
14 subsidiaries being separate and so forth.
15 We also, then, as I mentioned, cite cases
16 around the country that have been -- and we attached
17 two or three to our brief, that have dealt with this
18 particular situation, that is, RJR Nabisco and RJ
19 Reynolds Tobacco Company.
20 So, to the extent they're trying to claim it
21 somehow binds the subsidiary, that's clearly -- the law
22 is clearly to the contrary.
23 Secondly, as to the relevance, all of the
24 discussion about causation, his opinions, asking him
25 about the toxicology of cigarette smoke, they ask him

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1 about scientific causation, this man is a corporate
2 lawyer who worked in mergers and acquisitions for
3 20-some years before he became the chief executive of
4 this company.
5 And then the remoteness problem. He's -- he
6 didn't even come into this role until after this
7 lawsuit started. So, he comes into the role after the
8 lawsuit started for a different company, and they
9 questioned him extensively about what another company
10 did in 1950, and do you still believe that the Frank
11 Statement is accurate or not, and things such as that.
12 And then they go, as I say, to the other
13 extreme into the future and say: What is RJ -- what is
14 Nabisco, the parent, going to do about third-world
15 countries and things like that.
16 These are just examples we'd get into if we
17 went into it. So, on balance, there is no basis for
18 reading his testimony.
19 Now, there is no prejudice to the plaintiff,
20 because the plaintiff took the deposition of the
21 chairman of the company that's the party to this case,
22 and, Judge, all of the same questions were asked. I
23 mean, you remember they went through The Frank

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Statement, and the jury has heard all of that. So it's all cumulative, in addition.

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18361

But they've heard all of that. And there's no prejudice to the plaintiffs not to be able to show another deposition of somebody -- when you couple that with all of the problems that exist with this deposition, no prejudice. On the one hand, the jury has heard all of this from the chief executive of the tobacco company. Coupled with all of the problems, we believe that the deposition ought to just be excluded in its entirety.

Excuse me one second, Judge. Mr. Moss reminds me, the parent was actually a party in this case, Your Honor, in the beginning, and was dismissed.

So that's another basis for drawing this distinction.

That's the general comment I wanted to make.

MR. HEIM: Your Honor, maybe I ought to follow up with Bible for just a minute so you have in front of you the complete picture as to Bible and Goldstone.

And I thought the Court might be -- might have a sense of deja vu if I just read a little colloquy between Your Honor and Walt Cofer, because it sounds so much like --

THE COURT: I've got to run and get a picture.

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18362

MR. HEIM: That's right. You have to go get the picture off your wall.

MR. ROSENBLATT: Keep that picture in mind, Judge.

MR. HEIM: I was just struck by this. Your Honor said -- this is at the Broin transcript at 12961, and Your Honor had this to say, and this was the response by Mr. Cofer, and I'll just adopt it as my argument.

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10 The Court said: So we have to first discuss
11 whether or not they're going to be used and under what
12 circumstances and how much. Let's do the Bible first.
13 Okay. So I'll hear from both sides.
14 And then Walt Cofer said: Our position is
15 clear, Your Honor. Wrong CEO, not a party, not a
16 complete deposition. It's cumulative.
17 Does that sound like Cofer?
18 Your Honor allowed plaintiffs' extraordinary
19 discovery of not one but two CEOs. They have presented
20 testimony of both proper CEOs to the jury. They read
21 Bill Campbell's. They showed the videotape of
22 Mr. Morgan's deposition. The jury has heard it.
23 These are the CEOs of the tobacco
24 manufacturer. And this -- this deposition that he's
25 talking about, Bible's, was taken in an unrelated case.

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1 It's too late. It's not a party, and it's cumulative.
2 And, finally, the deposition is not complete.
3 And it goes on from there. So --
4 THE COURT: What did I rule?
5 MR. HEIM: You excluded it.
6 THE COURT: Oh.
7 MR. HEIM: But I'm hesitant to make that
8 argument in view of Your Honor's comments about --
9 THE COURT: I couldn't remember.
10 MR. HEIM: -- rulings in Broin.
11 But I thought it sounded so much like what we
12 just heard. And it is -- in fact, what has happened
13 here is that you -- the jury has heard Bill Campbell,
14 who was the CEO of Philip Morris, and they did watch
15 the videotape of Mr. Morgan, who followed him as the
16 CEO of Philip Morris.
17 So, it is exactly the same situation. That's
18 why I described it as deja vu.
19 It's the same situation. He's not a CEO of
20 this party. He's a CEO of the parent, just as
21 Mr. Goldstone was CEO of the parent, and it was taken
22 in the Chiles case.
23 THE COURT: What do you call a parent, it's
24 RJR or Philip Morris Companies?

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25 MR. HEIM: It's Philip Morris companies, Inc.

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18364

THE COURT: Inc.
MR. HEIM: Which is not a party in this action.
And the two CEOs of the parties in this action have been taken, and this -- in fact, it's curious. It's even more than that. Judge Postman permitted -- he said, if you want to take a deposition of Mr. Bible in this case, you can go and do that, if you want to try to do that.
And, of course, they never did that. They never proceeded to take Mr. Bible in this case. Judge Postman would rule on admissibility later. But he actually said, if you want to do it, you can go do it. They never proceeded to do that. Instead, they're trying to do exactly what they did in Broin, which is put in the same -- the same deposition that Your Honor excluded in the Broin case.
So, for the same reasons, that's why I said I would just adopt what Mr. Cofer said. Wrong CEO, not a party, it's cumulative, and they've already presented the testimony of the CEOs in this case.
THE COURT: Would that prevent him from being a fact witness, the fact that he's not a party?
MR. HEIM: Well, I --
MR. MOSS: It's hearsay.

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18365

MR. REID: Hearsay. It would be an admission.
MR. HEIM: It depends on what the testimony --
THE COURT: If he's not a party --
MR. HEIM: It would depend on what the testimony was.
THE COURT: That's the point.
MR. HEIM: But I think most of these questions, as I recall this, were framed in terms of more or less opinion testimony.
Mr. Bible, who was another one of these CEOs who was not with the tobacco company for a substantial period of time and then came back to the parent --

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15 THE COURT: For example, if there was a
16 meeting between corporate heads, and he attended
the
17 meeting, corporate head of Philip Morris, how do
you
18 call it, Philip Morris --
19 MR. HEIM: USA.
20 THE COURT: -- USA, had met and they
21 discussed general company policy and things of
that
22 nature, yeah, he might be a fact witness in that
23 regard.
24 The fact that he may be the corporate
head of
25 Philip Morris --

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18366
1 MR. HEIM: Companies, Inc.
2 THE COURT: -- Companies -- I mean, it's
3 Companies, Inc.?
4 MR. HEIM: Yes, sir.
5 THE COURT: Doesn't necessarily mean
that he
6 has a hands-on, working knowledge of what the
other
7 company, Philip Morris USA, may be doing.
8 MR. HEIM: Correct.
9 THE COURT: You can understand that.
10 Although, he probably does have some
working
11 knowledge of what they're doing, as the overall --
12 MR. HEIM: As Your Honor knows, Philip
Morris
13 Companies, Inc. owns a number of subsidiaries.
One is
14 the tobacco subsidiary. One is Kraft food. One
is
15 Miller Brewing. There's a number --
16 THE COURT: So, basically the question
is,
17 what do you really know about the operation of the
18 company, that's the question, and what it's doing
and
19 so forth.
20 MR. MOSS: That's not --
21 THE COURT: If they got reports, for
example,
22 on a regular basis and had to review them and had
to be
23 the final authority on some of the decision-making
24 process, that may be -- I don't really know.
25 MR. HEIM: I think Your Honor will find

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18367
1 there's nothing like that in the deposition.
2 THE COURT: Yes.
3 MR. REID: That's what I was going to
say.
4 The deposition doesn't go into that kind of

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material.
THE COURT: Oh, I understand.
MR. REID: It goes into the same material it did with Mr. Schindler.
THE COURT: I was trying to make the distinction, why somebody from another company could, in fact, be a witness even though he isn't a party. So I say it depends on the question and the type of information gathered and garnered from him in the deposition.
And as I say, I read through the deposition as if he's a CEO to the party in question establishing policy or speculation as to what the company might or might not want.
MR. REID: There's one little twist I think with Mr. Goldstone, and that is he became the CEO after this lawsuit started. So, by definition, almost any factual activity he would have undertaken would not be relevant to this case because it would have happened after.
THE COURT: Not necessarily. He may have reviewed a lot of stuff as part of his job.

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MR. REID: Again, there's none of that. There's no talk of that. They're asking about what somebody else -- as you see when go through it and read the deposition, you'll see it's -- it's Mr. Schindler's deposition all over.
MS. LUTHER: Judge, just for what it's worth, I haven't had the opportunity to read either Bible or Goldstone's deposition. But Liggett was not a party to the State of Florida case at the point in time those depos were being taken, so we didn't have an opportunity to cross examine.
So, I don't know if that's relevant or not, since I haven't read their testimony. But in light of the rule that you need to be a party to offer testimony against Liggett, I think that I need to preserve

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the
record.
THE COURT: There is some mention of LeBow, I think, in the deposition.
Your position, sir, is what?
MR. ROSENBLATT: Our position is, Judge, that Bible is the number one man in the world for Philip Morris. Our position is that Goldstone is the number one man in the world for RJ Reynolds.
And our position is that, in a case of this scope and sweep, where obviously the decision is

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totally discretionary with Your Honor, no honest lawyer would admit that -- would debate it if you allow it, it's not reversible, and if you disallow it, it's not reversible. It's discretionary.
Should they be permitted to hide in this case?
Now, Mr. Heim is maybe a third right. Judge, I can give you a file this thick, Judge, of the efforts that we made to try to take Bible's deposition. And he outsmarted us at every turn. And, finally, in frustration, we said, the hell with it. It's just not worth it. It's just becoming -- it's just becoming insane.
And we tried and we tried and we tried, and we couldn't get him. And at this point -- at this point today, I will say -- and, of course, there's not a chance in the world I'll get a straight answer, but I would say today, if they -- if the defense says they will bring in Bible and Goldstone, then we don't need -- we don't need the depositions. I'll cross examine them without a deposition if they say they'll bring them in.
But, of course, they're not going to commit to bringing him in.
Bible and Goldstone can tomorrow morning fire

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18370

the CEOs of the tobacco companies, the companies of which they are chairmen. They wholly own the tobacco companies.

And, Judge, as you pointed out, on Page 9 -- and Goldstone recognized this -- on Page 9 of his deposition, when he's asked the question: Would that be the philosophy of RJ Reynolds today under your leadership, that is, that the public health is the paramount consideration in business? And, you know, he doesn't quibble and say, well, you know, technically I'm not really the tobacco company; I'm this merger and acquisitions lawyer.

I mean, he dealt with reality. He's been selected as the number one guy, and he says: As you know, we own 100 percent of it, and I think that when you sell a product like cigarettes, public health has got to be a paramount concern, definitely.

They really should not be permitted, because we're not in a Federal court, we don't have the subpoena power, they should really not be permitted -- the number one -- and as I say, in a case -- I mean, they'll get up and talk about the law, and the law is it's discretionary. That's what the law is.

And a judge looks at the totality of circumstances. And we should -- the jury should have

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18371

an opportunity in this case, a class action, the only class action and the only smokers' class action in the history of tobacco litigation ever to go to trial -- and the same thing actually was with LeBow. I don't think LeBow -- LeBow was the president and CEO of the parent company. He -- there was another CEO of the tobacco company.

And I don't think we should engage in these fictions.

Now, with respect to Goldstone also, I'd

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point out to the Court that when the national settlement fell through, Judge, at the congressional level, it was Goldstone who voluntarily took center stage. This is a decision he made, to go out in front and have -- speak to the National Press Club in Washington, D.C.

He was on the cover of New York Times magazine, and he's been totally outspoken. He's been out there in front as the number one guy.

And he was very strident, and he had the right to take that position. But he didn't delegate it to the CEO of the tobacco company. He dealt with reality. He's the spokesman for RJ Reynolds, as Bible is the spokesman for Philip Morris.

They were deposed. Obviously, a judge felt

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that they could be deposed in the Attorney General case. The Attorney General of the State of Florida didn't represent any citizens of the State of Florida, and we do. We represent many thousands of them. And the jury should have an opportunity to hear from the number one -- from the number one Philip Morris person in the world and from the number one RJ Reynolds person.

MR. REID: Judge, if I could just make a couple of comments.

On the LeBow issue, of course, he was a director of the tobacco company, as well. So that's a different situation, to that extent.

You know, I think counsel concedes the point. This rises to a serious 403 problem, because he essentially just wants to get the CEO, the number one person as he says, here so he can ask the questions that are inappropriate to be asked.

We're not really dealing with -- I'm not sure he ever asked to depose Mr. Johnson in this case to start with. Maybe he can tell me he did. As far as I know, he didn't.

MR. HEIM: Goldstone.

MR. REID: Goldstone, I mean. I don't think

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25 he was ever sought to be deposed in this case.

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18373

But the point is, Your Honor, what we're really dealing with is whether the witness is competent, and there is some law -- we are dealing with law here. When counsel says there's no law here, it's discretionary, there is law.

Is he competent to talk about something that happened when he's been the CEO of one company for a year and a half, to talk about something when he was eight years old, 40 years before? And when you read the deposition, he doesn't say, did you go back and look at everything and did you develop factual opinions in light of what the Court was asking?

He asked the same questions. Do you think smoking causes disease? Do you think you should be warning people in the third-world about cigarettes? Do you think you should have the same warnings that Mr. LeBow -- that's where LeBow comes up, because he took out a pack of L&Ms and said, do you think you ought to be doing what Mr. LeBow is doing? Do you think smoking causes these diseases?

And it goes on and on.

So we're talking about competence to ask the questions that he wants to ask. We know exactly what we're talking about here because we have the deposition.

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18374

And I will point out on this issue of cross examination, in the governor's case, it was a completely different issue. The reason that you have the right to cross examine, sometimes the cases talk about -- there were completely different issues in that case from this case.

In attempting to bring that deposition in over here, when you read it, you'll find out it was nothing more -- it was taken by Mr. Motley,

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actually,
who bristled at me in comparison to Mr. Rosenblatt,
actually, in the deposition. I don't know if they talked to each other ahead of time or not.
MR. ROSENBLATT: I didn't catch that.
THE COURT: I didn't hear it.
MR. REID: When Mr. Motley said: Aren't you doing the other case?
And he said: Don't compare me with him or something like that.
That's beside the point.
MR. ROSENBLATT: Trying to make a little trouble on the side.
MR. MOSS: It seems to be working.
MR. REID: But the point is, Your Honor, when you read it, you know, there's no prejudice to the plaintiffs. All of this is in front of the jury.

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All he wants to be able to do is say I brought in the number one person and beat him around the head the same way he did with the other ones.
It's a 403 problem. The fact he has nothing to argue in return tells you it's a 403 problem.
What I suggest, since nobody is prejudiced at all, the jury has heard all of these questions over and over and over, including the head of the tobacco company, they ought to be excluded, and it shouldn't be allowed again.
THE COURT: Well, I would like time to look this thing over and digest those cases.
I mean, you only presented two of them, Diamits or Dymits, which might be material. And you have one in here, the U.S. -- it's Economy versus RJ Reynolds Tobacco.
MR. REID: Kirby versus RJ Reynolds. Different Kirby.
THE COURT: Do you have that one in here?
MR. REID: It's attached to the memorandum, Motion in Limine.
THE COURT: Let me see if I have it.
MR. REID: It's the very last one.
THE COURT: I don't think I have that one.
MR. REID: D-y-m-i-t.

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THE COURT: I have that one, and Economy.
Those are the only two.
MR. REID: You don't have the third one?
THE COURT: No, I don't have the third one.
MR. REID: I'll get it.
Your Honor, let me -- can I just add one other factual piece of information that I forgot to mention?
Nabisco didn't purchase RJ Reynolds Tobacco Company until the '80s.
THE COURT: Until when?
MR. REID: Until the '80s.
THE COURT: The '80s.
MR. REID: So that adds another difficulty. I mean, you've got a parent that didn't purchase the subsidiary here until the '80s, long after most of the things they're asking, you know, about happened.
So to the extent that bears on it, I just wanted to share that with you.
THE COURT: I would like to review it. I'd like to read those depos again in light of what we just said and see if I could assimilate it.
MR. REID: Could I ask you one question, Your Honor?
Do you have the second amended objections?

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That's the one we just filed. And it's the same form we've been using.
THE COURT: Yes.
MR. REID: Great. Okay.
THE COURT: So I'll review these two tonight.
MR. HEIM: Your Honor, I should hand up to the Court the Bible deposition with the highlighting that took place, and if you're going to review Bible --
THE COURT: I have Bible.
MR. HEIM: -- you're better off -- yes, but what you don't have, if you remember, on Friday, counsel changed and said they wanted the entire Bible deposition read.

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14 So, that required us to go back and make some
15 more objections. Since you haven't read it yet --
16 THE COURT: I have read it.
17 MR. MOSS: You didn't read it with what they
18 have.
19 THE COURT: I didn't read it in light of what
20 you're arguing.
21 MR. HEIM: I understand.
22 THE COURT: Now I want to look at it again
23 and see -- just look, like we're talking about a CEO
24 depo.
25 MR. HEIM: Yes.

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1 THE COURT: Nobody had raised the issue.
2 MR. HEIM: No. I understand that.
3 THE COURT: So now I want to look at it in a
4 different light.
5 MR. HEIM: All right. When you're looking at
6 it in that light, would Your Honor prefer to have in
7 front of you the same deposition, the Bible deposition,
8 with the additional markings of objections? Because I
9 can give you that.
10 THE COURT: Yes, sure.
11 MR. HEIM: So I might as well do that.
12 And I might point out, Your Honor, that this
13 deposition, of course, taken in the Chiles case, which
14 had a lot of different issues, is not -- it's one of
15 those depositions where, if it had been taken in the
16 Engle case and had I been there or a lawyer
17 representing Philip Morris there, you could have made a
18 decision whether you wanted to ask any clarifying
19 questions about the questions that were asked by the
20 lawyer for the plaintiff.
21 But since you aren't there, you know, you're
22 just dealing with somebody else's deposition. And
23 that's why the rule -- basically the rule says you're
24 supposed to use depositions taken in the same case, not
25 depositions taken in another case.

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18379

THE COURT: How come yours is thicker than this one?

MR. HEIM: Because I think mine has exhibits attached to it.

THE COURT: Mine is only 60-some-odd pages.

MR. HEIM: That's all mine is. Mine is 60 -- less than that. You're right. It's 67 pages. It just has exhibits attached to it.

It's harder to put in your briefcase.

THE COURT: Putting it in the briefcase is no problem. Carrying it is a different problem.

MR. REID: Judge, I gave you the Kirby case just now.

THE COURT: Yes. Kirby. Right.

Okay. All right. So I won't watch the ball game. So what?

MR. HEIM: Oh, no. Watch the ballgame.

MR. ROSENBLATT: Just watch the last quarter.

(Discussion off the record.)

THE COURT: All right. Let's say assume, just for the sake of assumption, that they are correct and I do not allow the testimony. We have to have something to do Tuesday and Wednesday.

MR. ROSENBLATT: Right.

THE COURT: We have Sandifur.

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18380

MR. ROSENBLATT: Sandifur is --

THE COURT: But that's another --

MR. SCHNEIDER: 280 pages.

THE COURT: How much?

MR. SCHNEIDER: 280.

THE COURT: And I haven't looked at that one, I don't think.

MR. SCHNEIDER: No, you have not.

THE COURT: Because I just got it.

MR. ROSENBLATT: And Nick Brookes.

THE COURT: Although, looking at it, it doesn't look like there's lot in it. There's not much.

MR. SCHNEIDER: There's about -- I'd say about half of it is marked.

THE COURT: I would say less, from what I can see.

MR. SCHNEIDER: I hope they marked it right.

THE COURT: In any event, I don't know

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if I'm
going to be able to read all three of these things in
one night.
MR. SCHNEIDER: It would take a substantial
period of time.
THE COURT: But --
MR. ROSENBLATT: Sandifur is not a video,
Judge.

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18381

MR. SCHNEIDER: That's right.
MR. ROSENBLATT: Now, Cahan is a problem because you're going to -- and apparently -- and Nick
Brookes is a problem.
Obviously, because of the short week, I --
THE COURT: I know.
MR. REID: Would you like to know what our
overall position on Cahan is? Would that help you with
our overall position on Cahan?
THE COURT: Sure. Why not? I'll listen to
anything.
MR. HEIM: And you have in this case.
THE COURT: I've heard almost everything.
MR. REID: We have objected, generically, to
Dr. Cahan, and it's contained in the first three or
four pages of our document, and then we've gone
through --
THE COURT: Cahan. Cahan.
MR. REID: -- we've gone through and made
specific objections.
But I want to tell you what our general
position is. I said this the other day, that it's
similar to some of the problems we faced with Father
Drinan in terms of the witness' scope of what the
witness likes to talk about.

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18382

We have a -- we have a serious cumulative
problem. He's a thoracic surgeon, lung surgeon, cancer
surgeon, Dr. Cahan. You remember Dr. Staples was here
and he's the same thing. He passed around the lung and
heart pieces and talked about surgery on them.

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With Dr. Cahan, notwithstanding that's his area of specialty, he gives opinions that cancer is the cause -- that smoking is the cause of 15 or so diseases. I mean, in addition to lung, emphysema, COPD and heart and cardiovascular, he opines it causes head and neck cancer, urology problems, bladder, cervix, leukemia, early menopause, miscarriages, phlebitis, kidneys and stroke.

He gives opinions that tobacco/nicotine is addictive. He gives opinions that there is a fraudulent public relations and legal strategy that's improper.

He gives opinions that there is a suppression of data and a description of evidence. That's in his deposition. He talks about his involvement with smoking bans in New York City and what he's done to try to get New York City to ban smoking and his involvement in the smoking ban.

He talks about the lack of cooperation about the industry, kind of a throw-back to the same kind of

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testimony that's elicited regarding The Frank Statement.

Now, in this case so far, and we tried to count these, and we may be off one or two, we've had nine witnesses who talked about causation. And Dr. Staples is the most significant one who's dealt with the thoracic surgery, that same identical specialty.

They want to add a tenth with Dr. Cahan. We've had ten witnesses who have dealt with addiction. They want to add an eleventh. I'll say as a sub-part of that, not only is it cumulative, but he's got absolutely no basis in his experience to give opinions.

He's not a psychologist, psychiatrist. He's had no training in pharmacology, none of the areas you would expect one to have to give opinions that a substance is addictive. He gives opinions.

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Nonetheless, not only is he cumulative, he's also completely incompetent to give testimony.

He has a long section about youth marketing. You know, we've had lots of testimony from plaintiffs' witnesses about youth marketing.

He talks about that we target -- he goes through and does exactly what several of the witnesses have done. He has his own personal ad collections he's

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going to bring in. He's going to go through those ads and tell the jury what they mean. Not only that they're plain English, the jury can understand them, but you have a completely incompetent witness in the area of advertising and marketing who's going to tell the jury what these companies are trying to do with these ads and why they're so bad.

He has a long section about his opinions about CTR. But he's said he's not read their material and doesn't know much about it, but they're no good anyway, essentially, and he goes through and he basically attacks CTR.

So you've got cumulative problems. You've got out-of-his-area -- out-of-his-expertise problems, lack of competence.

And then you have what I'll call outrageousness problems. For instance, a question was asked by counsel in his deposition: Gee, have you done a study comparing the tobacco companies to the Holocaust?

And he says he has, and he compares the number of deaths and so forth. He talks about that.

He talks at great length about how Newt Gingrich has called him a tobacco nazi and how proud he is of that. And then he has a whole section where he

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goes through famous person after famous person after famous person and tells their story. And he talks about how he met Yule Brynner because his mother-

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in-law
was in "The King and I."
And he went in, he said: I couldn't see his
bald head because of all of the smoke in the room, and
Yule Brynner said -- and he accents it -- it will never
get me.
He saw him years later, and he talks about
what Yule Brynner said.
Leonard Bernstein, Fredrick Lerner or
Fredrick Lowe of Lerner and Lowe.
MR. ROSENBLATT: "My Fair Lady."
MR. REID: "My Fair Lady." There are others.
I can't remember the other stars. He goes through all
these famous people, that he talks about what they said
to him or what he said to them.
Your Honor, that's throughout the deposition.
This deposition, for all of those reasons,
just ought to be completely excluded, and that's our
overriding position.
THE COURT: Could it cut the trial short?
Just read that one.
MR. REID: It could have eliminated about 30
witnesses.

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MR. ROSENBLATT: He actually made it sound
like a very interesting deposition to me, Judge.
THE COURT: It was.
MR. ROSENBLATT: It piqued your curiosity.
THE COURT: I read it.
MR. ROSENBLATT: We're not ready to argue
Cahan.
THE COURT: I know. I did read it, and it
was interesting.
MR. ROSENBLATT: Fascinating man.
Fascinating man. 50 years at Sloan-Kettering. A half
century.
THE COURT: You're not going to get into that
until January.
Okay. I had a thought. I wasn't sure where
we're going to go with it. We have still to do, before

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17 I think you rest, the privilege issues to discuss and
18 the Minnesota issues. I'm not sure if they're going to
19 be one and the same. If they are, great.
20 I was just wondering and thinking about, if I
21 do, if I knew in advance how much material we were
22 going to be talking about on the privilege issue, say,
23 the number of documents, it might be advisable to --
24 and I'm just thinking out loud here -- to talk in terms
25 of having a special master review it and advise the

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18387
1 Court the position the master might have, vis-a-vis the
2 crime fraud exception issue, much as we did in the
3 Broin case.
4 And I thought that was done early on in this
5 case, but I'm not sure it had ever got to fruition.
6 MR. MOSS: I don't think it ever got
7 anywhere.
8 THE COURT: Two things. I know that there
9 was a Zolen hearing up in Minnesota. We haven't had a
10 Zolen hearing here or a semblance of one. I think
11 we're going to have to be doing that kind of thing in
12 the first place.
13 Now if we're dealing with hundreds of
14 documents, the time between now and the time we get to
15 it would be an advantageous time for, say, a master to
16 review that stuff.
17 MR. MOSS: Are you anticipating the master
18 will hold the Zolen hearing?
19 THE COURT: I don't know. I was just
20 thinking about it, you know.
21 I'm really just trying to kick it around in
22 my head.
23 MR. MOSS: I think it's a worthwhile effort
24 here to talk about that.
25 THE COURT: Because it may be protracted. It

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18388
1 may be the kind of hearing that's going to take up some

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time.
Of necessity, you might have to have some evidentiary matters resolved. And if you're dealing with a lot of documents, that's a problem. If you're going to cut the documents down and not deal with a whole bunch of documents, like you did in Broin, when you had the B&W, you only had 28 or ended up with 28 --
MR. ROSENBLATT: Approximately.
THE COURT: Not like the 100 that might be valuable. Here I'm sure we'll have a lot more documents. But think about it and see what you want to do before we recess on, what, Wednesday afternoon or something like that.
MR. HEIM: The other thing that I didn't want to let pass, Judge, that we have yet to do, and at least I had suggested it to the Court, and I don't want it to pass because I think it's fundamental to what I've been trying to say over the course of several weeks, if not months, with this issue with regard to marketing to youth.
As Your Honor knows, I made a motion. Plaintiffs are going to respond to that in writing, as I understand it, and then we will have some argument, I believe Your Honor said, with regard to that motion.

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And I just -- I don't know whether it's possible to do that before the break or not. If it is, I'd like to do it. If it isn't, then I guess we can't do it.
But I do want to -- I do want to just offer this one thought to Your Honor on this subject, because as you know, it continues to bother me, and that is just simply this, for Your Honor to think about it, if the Court deems it worthy of thought, that if you take -- if you forget about preemption entirely, just forget preemption, and just look at the issue of relevance, pure and plain relevance of the youth

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marketing evidence, and you look at it in the context of Dr. Engle's claim and Frosene Steevens' claims and Mr. Angell's claims, all of whom are representative plaintiffs, Your Honor will see that none of those plaintiffs have any testimony to offer that makes youth marketing relevant to -- Dr. Engle will have testified that he didn't start smoking in reliance on advertising, and the others will have testified, because I know what they've said in their deposition, and the point about all of that -- and two of them, in fact, said that they began smoking when they were adults.

So, the point of what I'm making is that

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these are the representative plaintiffs in this case. They are -- have been certified by another -- by the Court as being representative of the claims of this class, and they are typical of the plaintiffs' claims in this class. And that's the basis upon which this class was certified.

So, if they have no claim that in any way turns upon marketing to youth because they have testified and will testify that they were totally uninfluenced by any advertising and/or didn't start smoking when they were underage, then what in the world would it have to do with the claims of the class? Forget preemption. What in the world can it have to do with that?

And at the very least, it would have nothing to do with the common issues in this case. It couldn't possibly.

So, you know, I just -- I don't want to let that get lost.

THE COURT: Well, I assume they're going to address that in their brief.

MR. HEIM: But the point -- and I assume they are. But that has nothing to do with preemption. That's pure and plain relevance.

THE COURT: I would want that topic

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discussed, whoever is going to do the response, because it is an issue, and they've raised it before, and they've got solid grounds on their motion, which has been filed, and it may have an effect on the case. I don't know.

Every time you start thinking about things like that, you start thinking about other things that might apply. And you get yourself to the point --

MR. ROSENBLATT: I think the immediate problem, Your Honor, is counsel has made precisely that argument. My understanding of this was, we're going to file our papers, then either we'll have an argument about it at some time. But the immediate problem is what are we going to do with this jury tomorrow and half a day Wednesday?

THE COURT: I don't know.

MR. ROSENBLATT: I mean, I don't really think --

THE COURT: I don't know really until I look at this stuff again.

MR. ROSENBLATT: I don't think we have the luxury -- I try to be quiet and I try to contain myself, but I don't think we needed that whole thing about Dr. Cahan. You know, they're going -- they're going to repeat again and again -- we're not dealing

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with Dr. Cahan's deposition this week.

THE COURT: He was trying to use the time.

MR. ROSENBLATT: Yes. Well, I think the time should be used. We're talking about Sandifur and what else after Sandifur.

MR. REID: I was -- let me apologize if I was out of line. I was under the impression we were going to deal with Dr. Cahan tomorrow.

THE COURT: No.

MR. REID: Apparently that's been

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changed
since last Friday when I was told. That's the reason.
If I had known it was next week, I wouldn't have said
it.
THE COURT: I'm waiting for some sort of response from them on that issue, Cahan. That's what I
thought. I thought it was put off until --
MR. ROSENBLATT: That was not clear to me.
MR. HEIM: Your Honor, on this other subject
of a response on the issue of the relevance and the
preemption of the youth marketing subject, perhaps
counsel could check -- I know that Mr. Rosenblatt isn't
going to write that, and my informed guess would be
that Mrs. Rosenblatt would write that brief.
Perhaps counsel could suggest to the Court
tomorrow when would be a time that would be convenient

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for plaintiffs' counsel to respond.
MR. ROSENBLATT: Okay.
THE COURT: All right. Yes. I'm sort of in
a quandary, because if we don't utilize these two
depositions tomorrow, I'm not sure what we're going to
do with the jury.
I guess we'll just have to play it by ear and
face that when we get to it.
I would like to give some serious considerations to these issues that came up today,
because I think they're entitled to that.
MR. ROSENBLATT: So, you know, even if you
were to rule favorably, Your Honor, these are very
brief depositions.
THE COURT: I know.
MR. ROSENBLATT: So that would not take the
whole day. So I guess the next thing we would deal
with would be Sandifur.
THE COURT: I'll do my best, folks.
MR. ROSENBLATT: No. I'm saying, even as we
go along tomorrow --
THE COURT: I'll do my best, which is always
trouble with depositions.
MR. ROSENBLATT: Right.
THE COURT: You know.

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18394

I mean, like just academically speaking, in the deposition, once you've asked a question, which is an objectionable question, the objection is raised at the deposition, but the answer is given and you just keep going.

Then, if it turns out later that that objection is sustained, that whole line of questions is thrown out of whack and may not be utilized.

But live, in trial, just as you did hear, you ask a question, which is objected to, but there's a way to come back and go in on the other side and ask a nonobjectionable question on the same subject matter and you can cure it. And it puts the Court in a heck of a position in trying to read through these depositions and getting appropriate information in front of the jury.

MR. ROSENBLATT: Sandifur, of course, is deceased.

THE COURT: Yes. No, but I'm --

MR. ROSENBLATT: Yes.

THE COURT: -- musing about the evils of a deposition. And it is a terrible way to try a case. It's an awful way to try a case, because it puts everybody in a position.

All right. I guess we will go ahead and

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18395

recess and see you tomorrow.

MR. MOSS: Regular time.

THE COURT: See you 9:30.

(Court was adjourned at 4:30 p.m.)

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